

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

673

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9582

GERHART EISLER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the District Court of the United States for the
District of Columbia.

DAVID REIN,
ABRAHAM J. ISSERMAN,
1105 K Street, N. W.,
Washington 5, D. C.,

CAROL KING,
220 Broadway,
New York 7, New York,

JOSEPH FORER,
1105 K Street, N. W.,
Washington 5, D. C.,
Attorneys for Appellant.

**United States Court of Appeals
for the District of Columbia**

FILED NOV 15 1947

Joseph W. Stewart
CLERK

INDEX.

	Page
Jurisdictional Statement	1
Statement of Case	2
Statutes Involved Appendix A	60
Summary of Argument	5
ARGUMENT AND STATEMENT OF POINTS	
I. The Court Erred in Refusing to Disqualify Himself Following the Filing of Appellant's Affidavit of Bias and Prejudice. (POINT 1.).....	10
A. The affidavit was substantively sufficient...	10
B. The affidavit was timely	12
C. The affidavit was sufficient in form.....	13
D. The affiant's good faith could not be questioned	14
E. Conclusion	15
II. The Appellant Did Not Receive a Fair Trial, and the Court Erred by Exhibiting Hostility and Bias. (POINT 2.)	16
A. Prohibiting or allowing objections before the witness completed his answer	16
B. Reprimanding and harassing defense counsel	17
C. Undue intervention in examination and cross-examination.....	27
D. The Court erred in that it made inconsistent rulings on evidence prejudicial to appellant; it allowed the prosecution to examine on and argue concerning certain subjects, while denying to the defense the opportunity to introduce evidence thereon. (POINT 3.).....	29
E. The Court erred by refusing to permit defense counsel to object to Court's charge out of the hearing of the jury. (POINT 4.).....	31

	Page
F. Comments at the hearing on the motion for new trial.	31
G. Concluding analysis	32
III. The Court Erred in Excluding Proffered Evidence that the Committee Was Acting Improperly and Beyond the Scope of its Authority. (POINT 5.)	35
IV. The Court Prevented the Defense from Proving and the Jury from Finding Matters of Proper Defense	37
A. The Court erred in that its charge was equivalent to directing a verdict of guilty. (POINT 6.)	37
B. The Court erred by excluding proffered evidence that the appellant merely attempted to make a legal objection to his being sworn by the Committee. (POINT 7.)	39
The Court also erred by refusing requested charges to the effect that the jury should acquit if it found that the appellant had merely attempted to make a legal objection to the Committee's requiring him to be sworn and to testify. (POINT 8.)	39
C. The Court erred in excluding proffered evidence that the appellant had, at the Committee's request, been unlawfully arrested and brought in custody to the Committee hearing. (POINT 9.)	40
D. The Court erred in excluding proffered evidence relative to appellant's good faith and lack of bad purpose. (POINT 10.)	41
The Court erred in refusing to charge that the jury must acquit unless it found that the appellant had an evil intent in refusing to be sworn and that "willfully" means with a bad purpose and evil intent. (POINT 11.)....	41

The Court erred in charging the jury that "willfully" required only that the appellant had acted intentionally and deliberately, as contrasted with accidentally and inadvertently. (POINT 12.)	41
E. The Court erred in excluding proffered evidence that the appellant was, at the time he appeared before the Committee, an alien in transit, detained in this country against his will. (POINT 13.)	42
V. The Indictment Does Not Allege a Violation of the Statute, Nor Was a Violation Proved.....	46
A. The Court erred in denying the motion for judgment of acquittal, since there was insufficient evidence to go to the jury. (POINT 14.)	46
1. There was no proof that the Committee sought any testimony from the appellant upon matters of inquiry committed to it	46
2. The proof does not establish that the appellant refused to be sworn	47
3. As an interned enemy alien, the appellant could not be required to testify before the Committee	47
B. The Court erred in denying the motion to dismiss the indictment, since a refusal to be sworn is not a "default." (POINT 15.)	48
VI. The Court Erred in Denying the Motions to Dismiss the Indictment and for Arrest of Judgment, Since the Authority of the House Committee on Un-American Activities, on its Face and as Applied, is Unconstitutional, and Since the Contempt Statute Cannot be Constitutionally Applied to Punish the Withholding of Testimony from the Committee. (POINT 16.)	49
A. The Act establishing the Committee places no limits on its authority to establish "propaganda"	50

	Page
B. The Committee, acting under its unlimited authority of inquiry, may and does impose political censorship of opinion and expression	53
C. Constitutional provisions violated	55
Conclusion	58

CASES CITED.

Adler v. United States, 182 Fed. 464	34
Barry v. United States ex rel. Cunningham, 279 U. S. 597	49
Barsky v. Holtzoff, D. C. App., Misc. 126 (June 11, 1947)	11
Berger v. United States, 255 U. S. 22	10
Board of Education v. Barnette, 319 U. S. 624	51, 55
Bridges v. California, 314 U. S. 252	55
Carlisle v. United States, 16 Wall. 147	43
Chambers v. Florida, 309 U. S. 227	59
Commonwealth v. Stallone, 281 Pa. 41, 126 Atl. 56	34
Connally v. General Construction Co., 269 U. S. 385	57
Covart v. Haskins, 39 Kan. 571, 18 Pac. 522	48
DeJonge v. Oregon, 299 U. S. 353	55
Egan v. United States, 52 App. D. C. 384, 287 Fed. 958	33, 35
Fields v. United States, D. C. App., No. 9486 (Oct. 27, 1947)	42
Grosjean v. American Press Co., 297 U. S. 233	55
Hartzell v. United States, 322 U. S. 680	42
Hurd v. Letts, 80 App. D. C. 233, 152 F. (2d) 121	10
In re Chapman, 166 U. S. 661	36, 43, 45, 49
Jones v. S. E. C., 298 U. S. 1	36, 56, 57
Jurney v. MacCracken, 294 U. S. 125	36, 43, 49, 56
Kilbourn v. Thompson, 103 U. S. 168	36, 43, 56
King v. Supt. of Vine St. Police Station, 1 K. B. 268 (1916)	47
Lambert v. United States, 101 F. (2d) 960	34
Lanzetta v. New Jersey, 306 U. S. 451	57
Laughlin v. United States, 80 App. D. C. 101, 151 F. (2d) 281, c. d. 366 U. S. 777	13
Marshall v. Gordon, 243 U. S. 521	56

	Page
Martucci v. Brooklyn Children's Aid Society, 140 F. (2d) 732	34
McGrain v. Daugherty, 273 U. S. 135	36, 43, 49, 56
M. Kraus & Bros. v. United States, 327 U. S. 614	57
Morris v. United States, 26 F. (2d) 444	13, 14
Murdock v. Pennsylvania, 319 U. S. 105	55
Near v. Minnesota, 283 U. S. 697	55
Page v. Sutton, Orlopp & Co., 29 Ark. 304	48
Panama Refining Co. v. Ryan, 293 U. S. 288	57
Re Pacific R. Commission (C. C.) 12 Sawy. 559, 32 F. 241	56
Rex v. Commandant of Knockalow Camp (Ex parte Forman), 117 Law Times, Reports 627 (1917)	47
Schenck v. United States, 249 U. S. 47	55
Screws v. United States, 325 U. S. 91	42
Sinclair v. United States, 279 U. S. 263	36, 45, 46, 49, 56
Starr v. United States, 153 U. S. 614	34
Stromberg v. California, 283 U. S. 359	57
The Schooner Exchange v. M'Faddon, 7 Cranch. 116	43
Thornhill v. Alabama, 310 U. S. 88	55, 57
Townsend v. United States, 68 App. D. C. 223, 95 F. (2d) 352, c. d. 303 U. S. 664	45, 48
United States v. Capital Traction Co., 34 App. D. C. 592	57
United States v. Dolsen, D. C. Dist. Col., Crl. No. 65801, June 20, 1946	41
United States ex rel. Schwartzkopf v. Uhl, 37 F. (2d) 891	40
United States v. Lovett, 328 U. S. 303	54, 55
United States v. Murdock, 290 U. S. 389	42
United States v. Reese, 92 U. S. 214	56
United States v. Wong Kim Ark, 169 U. S. 649	43
Whitaker v. McLean, 73 App. D. C. 259, 118 F. (2d) 596	11, 33
Williams v. United States, 93 F. (2d) 685	19, 34

STATUTES, CONSTITUTION AND TREATIES CITED.

U. S. C., Title 2, § 192 (Rev. Stats. § 102, as amended by Act of June 22, 1938, c. 594, 52 Stat. 942)	11, 60
U. S. C., Title 28, § 25 (Sec. 21 of Judicial Code, Act of March 3, 1911, c. 231, § 21, 36 Stat. 1090)	60

	Page
Sec. 121(b), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828	52, 61
D. C. Code (1940 ed.) § 11-306	1
D. C. Code (1940 ed.) § 17-101	1
Constitution, Art. I, sec. 9	9, 55
Constitution, First Amendment, ...	9, 55, 57
Constitution, Fourth Amendment	9, 41, 56, 57
Constitution, Fifth Amendment	10, 36, 41, 57
Constitution, Ninth Amendment	9, 55
Constitution, Tenth Amendment	9, 56
Geneva Convention on Prisoners of War	9, 48

RULES CITED.

Federal Rules of Criminal Procedure, Rule 30	31
--	----

TREATISES CITED.

Basic Field Manual, FM 27-10, Rules of Land Warfare	47
Black's Law Dictionary (3d Ed. 1933)	48
Blackstone, Commentaries	48
Coke on Littleton	48
Cyc. of Fed. Procedure	24
Flory, Prisoners of War	47
Hackworth, Digest of International Law (1942)	44
Hyde, International Law (1862)	47
Law of Land Warfare, prepared at Judge Advocate General's School	47, 48
Moore, International Law Digest (1906)	44
Oppenheim, International Law (6th ed., Lauterpacht)	47, 48
Oxford English Dictionary (1933)	48
Parrington, Main Currents of American Thought (1927)	51
Spaight, Air Power and War Rights	48
Wigmore, Evidence (3d ed.)	37

ARTICLES CITED.

Commager, Who Is Loyal to America?, Harper's Mag- azine, Sept. 1947, 193	47, 50
Constitutional Limitations on the Un-American Activ- ities Committee, 47 Col. L. Rev. 416	46, 50, 52, 53, 54

	Page
Frank, Disqualification of Judges, 56 Yale L. J. 605..	15
Gellhorn, Cry Shame, New Republic, Oct. 6, 1947.....	54
Wilson, Treatment of Civilian Alien Enemies, 37 Am. Jl. Int. Law 30 (1943)	47

MISCELLANEOUS.

Canons of Judicial Ethics (American Bar Association), First Canon	32
Canons of Judicial Ethics (American Bar Association), Fifth Canon	32
H. R. Rep. No. 2, 76th Cong., 1st Sess. (1939).....	53, 54
H. R. Rep. No. 1, 77th Cong., 1st Sess. (1941).....	54
H. R. Rep. No. 2748, 77th Cong., 2d Sess. (1943).....	55
H. R. Rep. No. 2742, 79th Cong., 2d Sess. (1947).....	54
26 Cong. Globe	37
34 Cong. Globe	42
87 Cong. Rec. (1941)	54
91 Cong. Rec.	53, 55
92 Cong. Rec. App. (1946)	52
93 Cong. Rec.	58
Cong. Rec., 75th Cong., 1st Sess.	52
9 Hearings before House Committee on Un-American Activities (1939)	54
U. S. Dept. State Bulletin, Vol. VI, No. 152, May 23, 1942	47
U. S. War Dept. Mobilization Regulations, No. 1-11 (1 April 1940)	47

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9582.

GERHART EISLER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the District of Columbia convicting Gerhart Eisler of violating Rev. Stats. § 102, as amended by Act of June 22, 1938, c. 594, 52 Stat. 942, U. S. C. Title 2, § 192.

Jurisdiction below was based on section 11-306, D. C. Code 1940 Ed. Jurisdiction of this Court is conferred by section 17-101, D. C. Code, 1940 Ed.

STATEMENT OF CASE.

Gerhart Eisler, the appellant herein, is an Austrian national (Joint Appendix 117), who came to the United States in June 1941 as a political refugee en route to Mexico under a transit visa (J. A. 113, 114). At the trial, the Court excluded evidence proffered to prove that Eisler was detained in this country by the government's cancellation of his transit visa and its refusal to grant his numerous requests for permission to leave the country (J. A. 95-98, 115, 116).

On January 24, 1947, the House Committee on Un-American Activities served a subpoena requiring Eisler to appear before the Committee in Washington on February 6, 1947 (J. A. 13, 22, 23). Thereafter, Eisler prepared for his forthcoming appearance by conferring with counsel, preparing a statement, buying railroad tickets to Washington for himself and his wife, and making Washington hotel reservations (J. A. 122, 110, 111).

On February 4, 1947, Eisler was arrested in New York as an "enemy alien" by two security officers of the Immigration and Naturalization Service of the Department of Justice (J. A. 80, 81, 82, 123). At the trial, the Court excluded evidence proffered to prove that this arrest was illegal, in that (a) Eisler was, as the Department of Justice knew, an Austrian national and hence not an enemy alien, (b) the arresting officers neither had nor exhibited a warrant of arrest, and (c) the government had earlier discontinued the arrest and internment of enemy aliens (J. A. 80, 82, 87, 88, 89, 90, 91, 92, 98, 102, 108, 109). The Court also excluded evidence offered to prove that this illegal arrest was instigated by the Un-American Activities Committee of the House of Representatives for the purpose of having him brought before the Committee and to punish him for his political beliefs (J. A. 79, 80, 88, 89, 100).

Eisler was taken by the arresting officers to Ellis Island (J. A. 124), and on the next day (February 5) was taken, still in the custody of the Immigration officers, to Washing-

ton, D. C. There he was confined in the District jail overnight (J. A. 83, 125). On February 6, 1947, he was taken, in the same custody, to the hearing room of the Committee on Un-American Activities (J. A. 13, 30, 85). During the hearing he was still in custody (J. A. 81).

At the hearing, the following occurred (read into the record from a transcript of the hearing (J. A. 43-47)):

The Chairman.¹ Now, Mr. Stripling, call your first witness.

Mr. Stripling. Mr. Gerhart Eisler, take the stand.

Mr. Eisler. I am not going to take the stand.

Mr. Stripling. Do you have counsel with you?

Mr. Eisler. Yes.

Mr. Stripling. I suggest that the witness be permitted counsel.

The Chairman. Mr. Eisler, will you raise your right hand?

Mr. Eisler. No. Before I take the oath——

Mr. Stripling. Mr. Chairman——

Mr. Eisler. I have the floor now.

Mr. Stripling. I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.

Mr. Chairman. Sit down, Mr. Eisler.

Now, Mr. Eisler, you will be sworn in. Raise your right hand.

Mr. Eisler. No.

Mr. Chairman. Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.

Mr. Eisler. I am not treated as a guest.

The Chairman. This committee——

Mr. Eisler. I am a political prisoner in the United States.

The Chairman. Just a minute. Will you please be sworn in?

Mr. Eisler. You will not swear me in before you hear a few remarks.

The Chairman. No; there will be no remarks.

Mr. Eisler. Then there will be no hearing with me.

¹ The Chairman of the hearing was Representative J. Parnell Thomas (J. A. 13, 14). Mr. Stripling is the Committee's chief investigator (J. A. 26). Mr. Mundt and Mr. Rankin are members of the Committee.

The Chairman. You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. Eisler. I am ready to answer all questions, to tell my side.

The Chairman: That is not the question. Do you refuse to be sworn in?

All right.

Mr. Eisler. I am ready to answer all questions.

The Chairman. Mr. Stripling, call the next witness.

The committee will come to order, please. What is the pleasure of the committee?

Mr. Stripling. Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.

Mr. Mundt. Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

Mr. Rankin. Not 'sworn in,' but to be sworn.

The Chairman. Mr. Eisler, do you refuse, again, to be sworn?

Mr. Eisler. I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The Chairman. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the committee. But first you have to be sworn.

Mr. Eisler. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The Chairman. Then you refuse to be sworn.

Mr. Eisler. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

Mr. Chairman. We will give you those 3 minutes when you are sworn.

Mr. Eisler. I want to speak before I am sworn.

The Committee then voted to cite Mr. Eisler for contempt (J. A. 52, 53).

On February 27, 1947, an indictment was filed charging that Eisler failed and refused to be sworn to testify before

the Committee, "and thereby on February 6, 1947, within the District of Columbia, willfully did make default" (J. A. 214, 215). Eisler was arraigned before Chief Justice Laws on April 22 (J. A. 230). Immediately prior to the arraignment, Carol King was admitted by Chief Justice Laws to the bar of the Court *pro hac vice* and entered her appearance as counsel of record for the defendant (J. A. 229, 230).

On May 23, 1947, the motion to dismiss the indictment was argued before and denied by Justice Holtzoff. (J. A. 4, 221). On May 29, Eisler filed an affidavit alleging bias and prejudice on the part of Justice Holtzoff (J. A. 22-226). The affidavit was accompanied by a certificate of Carol King, counsel of record, that it was made in good faith and not for hindrance or delay (J. A. 226). The affidavit recited, in substance, that Justice Holtzoff had, while legal adviser to the F. B. I., participated in F. B. I. investigations of aliens and Communists, including an investigation of Eisler, who is an alien Communist, and also that Justice Holtzoff had a personal hatred of Communists, as shown by his sponsoring of anti-Communist legislation and his friendship with and admiration for J. Edgar Hoover, who has used highly intemperate language regarding Communists.

The affidavit further stated that the affiant and his counsel had first learned on May 20, 1947 that Justice Holtzoff was to try the case; that on the same day the appellant asked one of his counsel if he was obliged to go to trial before Justice Holtzoff in view of the Justice's previous connections with the F. B. I.; that the various defense counsel arranged to discuss on May 23 the possibility of filing such an affidavit, but that because of the sudden death of the chief trial counsel's brother on May 23, the conference had to be postponed till May 27. The affidavit was executed in New York City on May 28, 1947.

The trial began on June 4, 1947 (J. A. 3, 231) before Justice Holtzoff, who struck the affidavit of prejudice and refused to disqualify himself (J. A. 2-6). Thereafter, Jus-

tice Holtzoff presided throughout the trial, gave sentence, and signed the judgment (J. A. 232).

Conduct of the Court, assigned as error as depriving the appellant of a fair trial, is described in part II of the argument herein, since it is not readily susceptible to condensed statement.

The jury returned a verdict of guilty (J. A. 3). Motion for new trial was argued and denied on June 27, 1947, and on the same date the Court gave the maximum sentence—one year's imprisonment and a fine of \$1,000 (J. A. 3, 212, 232). Notice of appeal was filed on June 27, 1947.

STATUTES INVOLVED.

See Appendix "A" Below.

SUMMARY OF ARGUMENT.

I.

A. The affidavit of bias and prejudice was sufficient in substance. Under the disqualification statute and controlling decisions, its allegations were not subject to contest as to truth or falsity. The allegations give fair support to, and allow a reasonable inference of, partiality on the part of the trial judge.

B. The affidavit was timely. It was filed only nine days after notice of the assignment of the trial judge and before trial. This period is not excessive in view of the gravity of the step involved and the need for factual verification. Furthermore, in this case, counsel were in two different cities, and chief trial counsel became unavailable for several days because of the death of his brother.

C. The affidavit conformed to all formal requirements. The certificate of good faith was, as required, signed by counsel of record, who had previously been admitted *pro hac vice*. There is no requirement that counsel of record also be a permanent member of the Court's bar.

D. The trial Court had no power to decide that the affidavit was not filed in good faith. The statute requires only

that counsel's good-faith certification be made, and under the authorities the trial Court may not make a factual review on this issue. Further, there is no basis for the Court's finding of bad faith.

II.

The trial Court deprived defendant of a fair trial by its prejudiced conduct, much of which took place in the presence of the jury. This conduct included numerous exhibitions of hostility toward the defense, unwarranted rebukes of defense counsel, excessive and unfair injection of the Court into the examination of witnesses, including the defendant, open minimizing of defense evidence and objections, refusals to allow defense counsel to make offers of proof, discrimination in treatment of defense and prosecution counsel, inconsistent rulings on evidence in favor of the prosecution, etc. The Court also violated Rule 30, Federal Rules, by refusing to permit defense counsel to object to its charge out of the hearing of the jury.

III.

The Court should have allowed the defense to prove that the Committee on Un-American Activities was acting beyond the scope of its and Congress' powers, in that it did not summon the appellant to elicit information of legislative concern but rather to harass him for his political beliefs, to prevent his departure from the United States, and for other ulterior purposes. The propriety of Congressional inquiries is subject to judicial review, and no person may be compelled to testify except in aid of a legitimate Congressional function.

IV.

A. The principal factual issue was whether the appellant had refused to be sworn except on his own conditions or whether he had not refused but had merely attempted to state legal objections to being sworn and compelled to

testify. The Court refused to put this issue to the jury, in whose province it belonged, but instead charged that the defendant had in fact refused to take the oath. Furthermore, it misstated the defense position by charging that the appellant contended he could condition his refusal to be sworn. It then charged that he could not do so. Thus its change was equivalent to directing a verdict of guilty.

B. The appellant should have been allowed to prove that he was merely trying to make a legal objection to being sworn in by the Committee, and the jury should have been instructed to acquit if such was his purpose. The making of an objection by a witness is an elementary and Constitutional right, and the record discloses that the Committee itself recognizes this right. Assertion of that right is not a "default" and certainly not a "willful" one. Moreover, assertion of the right cannot obstruct the performance of the legislature's duties and is therefore not Constitutionally punishable.

C. Appellant should have been allowed to show that he was unlawfully arrested and brought in unlawful custody to the hearing at the Committee's instigation. Under such circumstances, a witness has not voluntarily appeared and cannot be constitutionally punished for refusing to testify.

D. The trial Court construed "willfully" in the contempt statute as requiring only that the default be voluntary, as distinguished from accidental or inadvertent. This definition comports with the *Fields* case, which should be reconsidered and overruled.

E. Appellant should have been allowed to prove that he was an alien in transit, detained in this country against his will. As such he owed no duty to assist formulation of American legislation, and hence could not be compelled to testify.

V.

A.1. There was not sufficient evidence to go to the jury. The record contains no evidence to support the indictment's allegation that appellant was summoned to testify upon

matters of inquiry committed to the Committee. The Supreme Court has flatly stated that the government in a prosecution under the contempt statute must plead and prove that the testimony sought pertained to an appropriate legislative inquiry committed to the inquiring Committee.

2. The uncontradicted evidence is that appellant requested opportunity to make a legal objection for three minutes before taking the oath. This cannot support a finding of default or willful default.

3. As an interned enemy alien, the appellant had the rights and immunities of a prisoner of war. Hence, by treaty he could not have been required to testify before the Committee.

B. "Default" in the statute is a default of appearance. It does not comprehend a refusal to be sworn after appearance. The statute should not be construed as to punish those who are willing only to affirm.

VI.

The authority of the House Committee to investigate "propaganda" is unlimited, since the qualifying adjectives "un-American" and "subversive" have no meaning in usage, legislative history, or the Committee's practice. This sweeping authority is employed by the Committee to impose political censorship of views and opinions and to blacklist political dissidents. Hence the Committee's authority, on its face and as applied, violates the Ninth and Tenth Amendments by extending beyond the powers of Congress; violates the First Amendment by regulating and suppressing thought and opinion in the absence of a "clear and present danger" of substantive harm subject to legislation; violates the prohibition against bills of attainder in Article I, sec. 9; is an unreasonable search in violation of the Fourth Amendment; and is an invalid delegation of power because of lack of standards. Nor can the statute

be saved by a conning judicial construction. If the contempt statute is applied to withholding of testimony from the Committee, it violates the Fifth Amendment because it does not supply an ascertainable standard of guilt.

ARGUMENT.

I. The Court Erred in Refusing to Disqualify Himself Following the Filing of Appellant's Affidavit of Bias and Prejudice. (Point 1 on Appeal).

A. The affidavit was substantively sufficient.

Shortly summarized, the affidavit of bias and prejudice makes the following points: (1) As legal adviser to the F. B. I., Justice Holtzoff participated in investigations of aliens and Communists, including a specific F. B. I. investigation of the appellant (an alien and a Communist) which resulted in a report that he is a foreign agent. (2) Justice Holtzoff has a personal hatred of Communists, as shown by his sponsorship of a bill for the deportation of alien Communists and their incarceration in concentration camps and by his admiration for and close friendship with J. Edgar Hoover.

The allegations made in an affidavit of bias and prejudice may not be reviewed for truth or falsity either by the judge against whom the affidavit is addressed or on appeal. On the contrary, the simple issue is whether the allegations "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 U. S. 22, 33, 34. As stated by this Court, "the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable man may fairly infer personal bias or prejudice on the part of the judge." *Hurd v. Letts*, 80 App. D. C. 233, 234, 152 F. (2d) 121, 122. This rule conforms to the Congressional solicitude, remarked in the *Berger* case (255 U. S. at 35, 36), that "the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give

assurance that they are impartial." Cf. *Whitaker v. McLean*, 73 App. D. C. 259, 118 F. (2d) 596.

It is apparent that the affidavit amply satisfies the substantive requirement described. It can be inferred from the affidavit's allegations that Justice Holtzoff was predisposed against the appellant, since an investigator may reasonably be supposed to entertain a prejudice against one whom he has investigated and found guilty of reprehensible conduct. It can not promote public confidence in the judiciary for an investigator to sit in judgment on the person he investigated. By the same token, it is offensive to the policy of the statute for one who has an extreme personal hatred of Communists to judge a Communist. Hatred, like other emotional attitudes, is itself susceptible of proof only by inference, and in this case the inference is fairly supported. One who proposes to deport and incarcerate alien Communists and who admires, supports, cooperates and is friendly with, an official who describes Communists by intemperate, unofficial epithets, may reasonably be supposed to have exhibited a "bent of mind" with respect to Communists.

In *Barsky v. Holtzoff*, April Term 1947, Misc. 126, decided June 11, 1947, rehearing denied, June 12, 1947, this Court issued a writ of prohibition compelling Justice Holtzoff to disqualify himself in a prosecution under the same contempt-of-Congress statute. The circumstances recited in Barsky's affidavit are precisely those alleged in this appellant's affidavit with regards to Justice Holtzoff's participation in F. B. I. investigations, except that a different organization is involved. The identity of the Eisler and Barsky affidavits on this point was recognized by Justice Holtzoff himself. The Barsky affidavit had been filed after the appellant's affidavit and was stricken by Justice Holtzoff following the same action in the appellant's case. In ruling on the *Barsky* case, Justice Holtzoff stated:

I refer to my memorandum in the case of *United States v. Eisler*, in which a similar affidavit was filed, and which I overruled for the same reasons. In my memo-

random in that case, I expounded at considerable length the principles to which I have just referred, and stated authorities. I will consider my memorandum in that case incorporated as part of my ruling in this case.

This Court had made the Barsky writ absolute by the time this appellant's motion for a new trial was argued. In adhering to his earlier ruling, Justice Holtzoff distinguished the *Barsky* case not on any substantive ground but solely on the basis of asserted formal defects. These are subsequently considered herein.

In the *Berger* case, *supra*, the Supreme Court compelled the disqualification of Judge Landis in a trial of German and non-German socialists upon an affidavit alleging his personal hostility to Germans and German-Americans. The case is thus controlling authority to require disqualification where, as is the case here, the affidavit of a Communist defendant demonstrates that the judge has a personal hatred of Communists.

In striking the affidavit of bias and prejudice, Justice Holtzoff ignored the first-summarized allegations except to say that they were insufficient and, as a closing aside, to deny them. The other allegations, whose gist is that Justice Holtzoff has a personal hatred of, and engaged with Mr. Hoover in violent activities against, Communists, were misconstrued by the trial Court into a mere allegation that he is a friend of Mr. Hoover, who had made uncomplimentary references to Communists.

B. The affidavit was timely.

The lapse of eight days between the time the defense first learned that Justice Holtzoff had been specially assigned to try the case and the date the affidavit of prejudice was filed, was attributable to the sudden death of the chief trial counsel's brother, as explained in the affidavit itself and our statement of the case.

But even without these circumstances, a lapse of eight days between knowledge of the identity of the presiding

judge and filing of the affidavit indicates no absence of diligence, particularly when the filing took place well before the trial date (June 4). The filing of such an affidavit is not to be taken lightly by any reputable lawyer. He too has a stake in the preservation of public confidence in our judicial system. He can be disciplined for contempt if his zeal in certifying and filing the affidavit exceeds his discretion. *Cf. Laughlin v. United States*, 80 App. D. C. 101, 151 F. (2d) 281, cert. denied, 326 U. S. 777. If the affidavit is stricken, he must try his case, and perhaps future cases as well, before an estranged judge. When the client, therefore, suggests action for disqualification, the lawyer must consider the matter carefully. He must examine the client closely and seek independent verification of the client's assertions. Co-counsel must consult, even if they reside in different cities. The affidavit filed in this case shows on its face that research preceded its preparation; see, for example, the references therein to the Congressional Record, to hearings of the House Judiciary Committee, and to a House Report.

That it is proper for counsel to delay filing an affidavit of prejudice until he is sure of his ground has been recognized by the Eighth Circuit in *Morris v. United States*, 26 F. (2d) 444, which, in holding an affidavit to have been timely filed, regarded only the lapse of time after the hesitant attorney had received more convincing evidence of his client's assertions than had previously been at hand.

The fact that motions to dismiss the indictment had been decided by Justice Holtzoff on May 23, 1947, is immaterial. In the *Barsky* case the affidavit of bias and prejudice was not filed until after Justice Holtzoff had denied motions to dismiss the indictment; nevertheless, this Court issued the writ of prohibition.

C. The affidavit was sufficient in form.

A comparison of the affidavit with the terms of the statute shows a scrupulous conformance to the formal requirements. However, one of the reasons assigned by Justice Holtzoff for striking the affidavit is an asserted defect in

form in that the certificate of good faith was signed by Carol King, who, he stated, was not counsel of record for the defendant (J. A. 5), as required by the statute. This assumption was palpably erroneous. Mrs. King was counsel of record beyond dispute, and the prosecution so stipulates (J. A. 229, 230). She was admitted *pro hac vice* by Mr. Chief Justice Laws at the arraignment. (Justice Holtzoff's statement in his opinion on the motion for new trial that he admitted Carol King *pro hac vice* (J. A. 206) is erroneous).

In the opinion on the motion for new trial, the trial Court abandoned its error of fact and relied instead on the circumstance that Carol King is not a member of the local bar.

To require that the certificate of good faith be signed by a counsel of record *who is also a member of the local bar* is a judicial amendment of the statute wholly unsupported by any statutory language, legislative history or court decisions.

D. The affiant's good faith could not be questioned.

As an additional ground for striking the affidavit, the Court below stated that the affidavit was not filed in good faith. In making such a finding, the Court added still another requirement to the plain language of the statute. The statute requires that the affidavit be "accompanied by a certificate of counsel of record that such affidavit and application are made in good faith." This requirement of the statute, as we have shown above, was fully met. The statute does not permit the trial Court to go beyond this requirement and to inquire as to whether the affiant did or did not have good faith. *Morris v. United States*, 26 F. (2d) 444.

To permit the trial Court to go outside the affidavit in order to rebut the affiant's good faith, would be nothing more than an evasion of the doctrine of the *Berger* and *Barsky* cases that the trial Court may not review the facts in the affidavit. The legislative requirement of a good faith certification by counsel was designed to eliminate this problem. In the *Berger* case, the Court said that to

permit the judge charged with partiality to pass on the facts would simply perpetrate the very evil against which the statute is directed. The identical reasoning would forbid the trial Court to go outside the affidavit and make findings as to the affiant's good faith. Indeed, the latter situation is more extreme. For how can the trial Court rule on the affiant's motivation without a hearing? And in what manner can the affiant, if he wishes, dispute the findings of the Court if they are based on facts outside the record.²

E. Conclusion.

We urge the Court to reaffirm the policy of the statute and the doctrine of the *Berger* case that the statute's "solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial" (at 35, 36). To the argument that to permit disqualification of judges upon the mere filing of affidavits would lead to abuses, the Court answered as follows (*Berger* case at 35):

And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? Of what concern to other parties to have him so preside?

There are twelve justices in the District Court for the District of Columbia. If Justice Holtzoff had excused himself another justice could have been assigned, the policy of the statute effectuated and no injury done to the administration of justice. See Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 629.

² In the present proceeding the trial Court relied upon certain occurrences in chambers (J. A. 4, 206). Counsel's recollection of this incident does not conform with that stated by the Court. We submit that the injection of such factual issues will not promote the policy of the statute or the administration of justice. Further, none of the facts recited by the Court would appear to warrant its conclusion of bad faith.

II. The Appellant Did Not Receive a Fair Trial, and the Court Erred by Exhibiting Hostility and Bias. (Point 2 on Appeal).

The trial Court's manifested hostility was so pervasive in nature that it cannot be fully appreciated without a review of the entire record. The following points up only some of the more glaring instances of bias.

A. Prohibiting or allowing objections before the witness completed his answer.

The trial Court made clear to defense counsel that a government witness, under cross-examination or otherwise, was to be allowed to finish his answer before any objection by defense counsel would be entertained.

Thus defense counsel was not permitted by the Court to object to the testimony of the witness although it was clear that the witness was speculating (J. A. 14, 15); that the witness had completed his answer but was about to add additional matter not called for by the question (J. A. 21); that the witness was addressing remarks to the Court instead of answering a simple question on cross-examination (J. A. 39); or that the witness' response was going far beyond the scope of the question (J. A. 42-47, 20).

In sharp contrast, the Court did not apply its announced rule so as to prevent the prosecution from interrupting a witness' answer. Examples appear in the joint appendix at pages 99, 113, 122, 124. The following is illustrative (J. A. 122):

Q. [By Mr. Isserman] Did counsel advise you as to these rights?

A. [By the defendant] Yes, counsel advised me——

Mr. Hitz: I am sorry, you have answered the question.

The Court: Just answer yes or no.

Not only did the court permit Government counsel to interrupt a witness before his answer was complete, but

the Court, contrary to the rules laid down for defense counsel, itself on a number of occasions interrupted the defendant, when he was on the stand, before he had finished his answer, and prevented its completion (J. A. 114, 117, 129, 143).

The following examples are illustrative:

Q. [By Mr. Isserman]: Mr. Thomas has testified at this trial, Mr. Eisler, that after you were asked to take the stand you said, 'I am not going to take the stand', and I ask you now whether you made that statement?

A. [By the defendant]: Yes, it was the first part of the statement which I was not able to answer because I was interrupted.

Q. What is the second part?

A. I wanted to say——

The Court: No, you have answered the question. (J. A. 129).

Q. [By Mr. Isserman]: Did you have any other papers?

A. [By the defendant]: Yes, I had a Mexican substitute passport, because I was invited——

The Court: Just a minute, you have answered the question. (J. A. 114).

Thus the no-interruption rule was applied only to the defense and not to the prosecution or the Court.

B. Reprimanding and harassing defense counsel.

(a) Defense counsel was cross examining Stripling, Chief Investigator of the House Committee on Un-American Activities, as to the hearing on February 6, 1947 at which Eisler committed the alleged contempt. Counsel was trying to show that Eisler actually took the witness chair, a point on which the witness had been evasive. The following took place (J. A. 33, 34, 35):

Q. [By Mr. Isserman]: Isn't it true that Mr. Eisler sat down in the chair reserved for witnesses at the very beginning of the hearing?

A. [By Mr. Stripling]: I don't recall that he did, no.

Q. Well, do you have any recollection as to when Mr. Eisler took the witness stand?

A. It is my recollection that he sat down when the Chairman made his preliminary remarks—while he was reading his preliminary remarks.

Q. So that it was shortly after Mr. Eisler stated, according to your testimony, 'I am not going to take the stand,' that he actually sat down in the witness chair; isn't that true?

A. I don't recall exactly whether he sat down or whether he stood.

The Court: I think that is minutiae and is immaterial, because the charge against the defendant is that he declined to take the oath. What chair he was sitting in or whether he was seated or standing is, I think, immaterial. I suggest to counsel that the interrogation be directed to the charge in the indictment.

Mr. Isserman: Well—

The Court: Do not argue. I made a suggestion. Proceed to the next question.

Isserman: I would like to have an answer to the question I just put.

The Reporter (reading): 'Question: So that it was shortly after Mr. Eisler stated, according to your testimony, "I am not going to take the stand," that he actually sat down in the witness chair; isn't that true?'

By the Court:

Q. If you don't remember, say you don't remember.

A. I don't remember.

By Mr. Isserman:

Q. Do you remember that he sat down in the chair at all, Mr. Stripling?

A. I am not positive whether he sat down or not.

Q. Just a few minutes ago you said Mr. Eisler walked over to the table and sat down in a chair reserved for witnesses. Now, did he or did he not do that?

The Court: You have the record; do not repeat the same question.

Mr. Isserman: That is not in the record. This is a matter outside the record.

The Court: I mean it is already in the record of what this witness testified this afternoon. You are repeating the same question.

Mr. Isserman: It is not clear to counsel. The witness has contradicted himself.

The Court: The question is in the record. Now, proceed to another question.

Mr. Isserman: I would like to resolve the contradiction by continuing questioning on this point.

The Court: Ask a specific question with a view to resolving the contradiction if you wish. You may do that.

This passage does not merely illustrate reprimands to counsel in which the Court admonishes him not to "argue" and not to "repeat" what the Court designates as "the same question." It illustrates, as well, the Court's interference with cross examination and its effort to cut off cross-examination by suggesting to the witness that he may answer "I don't remember," although there was nothing in the record which indicated that the witness' difficulty on cross-examination arose out of a lapse of memory. (For the impropriety of such a suggestion, see *Williams v. United States*, 93 F. (2d) 685, 688, 689). The Court also by its reference to "minutiae" minimized the possible effect or value of cross-examination.

For a similar reference to "minutiae", see J. A. 84.

(b) When defense counsel moved to strike a remark made by the witness Thomas, the following occurred (J. A. 42):

Mr. Isserman: I ask that that remark be stricken as not being responsive.

The Court: It may be stricken. Just state your motion; do not argue.

Mr. Isserman: I have not argued; I just stated my ground.

(c) A few minutes later, the Court again rebuked defense counsel. The following took place (J. A. 45-46):

Mr. Isserman: Have you read all the questions and answers which deal with Mr. Eisler's refusal to be sworn?

Mr. Thomas: Up to that point. I shall be glad to continue.

Mr. Isserman: Just a moment; you will get an opportunity to continue.

The Court: Do not argue with the witness.

Mr. Isserman: Well, the witness was remonstrating with counsel. I ask that he be admonished to answer the question.

The Court: I suggest to counsel that he proceed as counsel should.

Mr. Isserman: I wish to make objection to your Honor's remark and ask that it be stricken.

The Court: Motion denied. Counsel's function on cross-examination of a witness is solely to ask questions and not to remonstrate with the witness. Now, proceed and ask the next question.

If the Court had not intervened—and there certainly was no occasion for it—the cross-examination would have proceeded without incident. But taking advantage of a triviality, the Court managed to rebuke counsel twice.

(d) Subsequently the Court at the bench delivered a most severe rebuke to defense counsel. Defense counsel was cross-examining Congressman Thomas when the following occurred (J. A. 50-51):

Q. [By Mr. Isserman] Now, Mr. Thomas, you say that the attorney for Mr. Eisler, Mrs. King, who is sitting at counsel table, made no effort to state any objection; is that your best recollection?

A. [by Mr. Thomas] There is one sentence in this testimony which indicates the only time that Mrs. King made any effort to do anything other than give out a lot of papers.

Q. Just a minute. That sentence was addressed to you by Mrs. King, was it not?

Mr. Hitz [Government attorney] What sentence are you talking about?

Mr. Isserman: The sentence the witness has just referred to. He knows what sentence I am talking about.

The Court: Let us not have any colloquy.

Mr. Isserman: Well, I would like to get an answer from the witness.

The Court: Will counsel come to the bench, please?

Counsel as the Court directed, then approached the bench, and the following occurred (J. A. 51, 52) :

The Court: Mr. Isserman, the Court appreciates the fact that you are from out of town. I do not know what the practice is in your jurisdiction, but in this court the custom is for counsel to be urbane, courteous, and civil, and not to speak abruptly or opprobriously.

Mr. Isserman: I want to object to your Honor's remark and ask that it be stricken from this record, because there is no basis for it.

The Court: *I did you the courtesy of saying this at a bench conference, so that the jury should not hear my remarks; but you do not take them in the spirit in which they are intended. If you are not going to be urbane and courteous, I shall the next time I have to call attention to the fact do it in the presence of the jury.* [Emphasis added.]

Mr. Isserman: Will your Honor hear me?

The Court: No.

Mr. Isserman: I move that your Honor's remarks be stricken, as indicating nothing that has happened in this courtroom. I think counsel should be allowed leeway in cross-examination. . . .

The Court: They are allowed leeway, but they must always be within the bounds of courtesy.

Mr. Isserman: I believe I have observed those bounds.

The Court: No, you have not, particularly in the way you addressed the Court. Abruptness is not permitted. No local counsel ever departs from an urbane, courteous manner to the Court.

Mr. Isserman: I will try to be courteous and urbane in my remarks.

The Court: I am trying to help counsel, because if you were a member of this bar and you acted like that, the consequences would be much more severe. However, I know that perhaps—well, I do not know what the custom is where you practice, so I want to give you the advantage of a warning in advance.

The italicized portion of the foregoing is a threat which, as we shall see, was subsequently fulfilled. The excerpt also reveals a hostility to counsel because he was "from

out-of-town," and the Court's recognition of the effect on the jury of the Court's previous rebukes of counsel in the jury's presence.

(e) On a simple matter of identifying a telegram, the Court by its intervention made difficulties for defense counsel and treated counsel in a brusque manner which was bound to influence the jury. Counsel was trying to indicate by whom the telegram was signed (J. A. 91, 92).

Mr. Isserman: May I have the telegram dated April 12, 1947, addressed to the Honorable John F. McGohey, United States District Attorney, U. S. Court House, New York, signed——

The Court: Don't go into all those details.

Mr. Isserman: I want to identify the telegram.

The Court: Just identify it briefly.

Mr. Isserman: I am going to give the——

The Court: Don't tell me that, just identify it briefly.

Mr. Isserman: I am trying to do as Your Honor tells me.

The Court: The Court has the last word.

Mr. Isserman: I shall complete the identification by indicating that it is signed by Tom C. Clark, Attorney General.

(f) Several examples of the Court's impatience and intemperance in dealing with defense counsel appears from the following (J. A. 227-229):

Q. [By Mr. Isserman] Mr. McInerney, I now ask you whether or not Defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for any change of status from his status as to being there on a transit visa, up to and including February 4, 1947?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would state that the defendant Gerhart Eisler never applied for change in status.

The Court: Well, you mean you expect him to say no. That is the offer of proof.

Mr. Isserman: No.

The Court: Because your question calls for a yes or no answer.

Mr. Isserman: May I have the question read, please?

The Court: No, you may proceed.

Mr. Isserman: Well, Your Honor, I would like to——

The Court: You ought to know how to make an offer of proof.

Mr. Isserman: I am asking the stenographer to tell me what I asked. I want to make sure the defendant's point is covered.

The Court: You may do it this time but don't do it again. You ought to know your own question.

Mr. Isserman: May I object to the Court's remark? I think it is improper and I ask that it be stricken out.

The Court: The Court never strikes its own remarks. You may object to the Court's remarks, but the Court never strikes its own remarks.

Mr. Isserman: I ask to have the Court's remarks eliminated from the record.

Would you read the question?

(Pending question read by the reporter.)

The Court: You see, that calls for a yes or no answer.

Mr. Isserman: No, it doesn't, it calls for it in the alternative, and I would like to state an offer to prove.

The Court: State it.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would answer that the defendant, Gerhart Eisler, did not apply for a change in status from the status of an alien in transit to Mexico from the time of his entry in the United States in June, 1941, up to and including February 6, 1947.

The Court: I still say the question calls for a yes or no answer. I think you are wasting time unnecessarily and I sustain the objection.

Mr. Isserman: I am constrained to enter another objection to Your Honor's statement.

The Court: Very well, you have the privilege of doing so.

Thus several pages of display of feeling by the Court against defense counsel are hinged upon the Court's definite misconception, persisted in, that the "whether-or-not" question asked of Mr. McInerney was capable of being answered "yes" or "no". Although the colloquy was precipitated by the Court's unnecessary criticism of the offer of

proof, which had not been objected to, the Court ended by criticizing defense counsel for wasting time. In the short passage quoted, the Court rebuked counsel for not knowing how to make an offer of proof; refused at first to allow the reporter to re-read the question, then permitted it, but only with a warning that defense counsel should not again request the reporter to do so; and charged defense counsel with "wasting time unnecessarily." Moreover, when these remarks of the Court were asked to be stricken from the record, the Court replied that while counsel might object, "The Court never strikes its own remarks." (*Cf. 9 Cyc. of Fed. Procedure* 486-7 to the effect that an error in a remark made by a court "ordinarily is cured by the act of the judge in withdrawing it and ordering it stricken out.")

(g) At the close of one of the trial days, defense counsel indicated, after stating that he had completed the direct examination of the defendant Eisler, that he would have "one or two additional questions" to ask of Mr. Eisler when the Court reconvened and would not like to be precluded from doing so. The Court stated that he would not be precluded. At the beginning of the next day, when defense counsel was directed to proceed, the following occurred (J. A. 136):

The Court: You may proceed.

Mr. Isserman: If the Court please, I had reserved the right to ask the defendant a few more questions. I should like to do so at this time.

The Court: You do not reserve the right; the Court will grant that privilege in its discretion.

Mr. Isserman: I mentioned it at the close of the session yesterday.

The Court: You may proceed.

Even this simple matter became a subject of rebuke to defense counsel.

(h) When the Court sustained a defense objection that no foundation had been laid for introduction of a document offered by the prosecution, the Court, although recognizing the legal soundness of the objection, nevertheless implied in

the jury's hearing that defense counsel was being technical and was obstructing the trial in that the transcript, if it were in evidence, "would be helpful" and that "the objection, even if sustained, does not amount to anything." (J. A. 54).

(i) At one stage of the trial (J. A. 102-104), defense counsel, because of complaint by the appellant that there had been too many bench conferences out of his hearing and that he could not keep abreast of the course of the trial, requested the Court to allow appellant to be present at bench conferences or that the conferences occur not at the bench and that whenever necessary the jury be excluded from the court room. The Court refused to allow appellant to approach the bench, but stated that it would permit defense counsel to have such conferences in open court except for "some offers of proof" which it would not permit to be made in open court. Subsequently the Court refused to allow defense counsel to make certain offers of proof, including, as one of the grounds, that the Court would not permit such offers of proof in open court (J. A. 108, 109). Thereafter, defense counsel offered to approach the bench to make such offers of proof. In the presence of the jury, the Court refused in the following manner (J. A. 109):

The Court: No; in the light of the statement made by defense counsel I will not allow that. You stated at the last bench conference that you preferred everything done in open court; that your client objected to having things done at the bench that he could not hear. I informed you that the only purpose of a bench conference is to protect the defendant. Now, you may not change back and forth.

Mr. Isserman: I am not trying to change, if Your Honor please, but I believe an offer of proof is necessary in this case, and if we cannot make it in open court, we should like to make it at the bench, although I believe—

The Court: Proceed with the next question

The Court, then, was punishing the defendant because of the position defense counsel had taken on the question of

bench conferences, and the Court's comments, made in the jury's presence, were harmful to the defendant.

(j) The Court, at a subsequent time, did allow the defense counsel to make an offer of proof at the bench on a most important point, but only after a colloquy which had harmful effect on the jury. When the Court finally did allow it to be made, the Court was impatient with counsel and sought unduly to curtail counsel's offer, as the following shows (J. A. 133-135):

Mr. Isserman: Now, will you tell us what you intended to say to the House Committee on Un-American Activities in the three minutes you asked for before being sworn?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary; I consider that irrelevant.

Mr. Isserman: I believe if your Honor would hear my offer of proof it would not be irrelevant. I believe your Honor would so consider it.

The Court: Ordinarily I do not permit offers of proof before the jury because that is an indirect way of getting testimony in before the jury after the Court has excluded it. Moreover, I consider the subject matter irrelevant.

Mr. Isserman: I am perfectly willing to make the offer of proof at the bench if your Honor will allow us to make it there.

The Court: You may come to the bench.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Make it very brief. Do not take the full three minutes; make it very brief.

Mr. Isserman: The defendant, if allowed to answer this question, would state that he would have made the following remarks: "I am a political prisoner"—

The Court: No, I am not going to allow you to read the whole statement. What is the general import?

Mr. Isserman: To the Committee causing this illegal arrest because the illegal arrest was procured by Mr.

Thomas and members of the House Committee on Un-American Activities; that the purpose of the arrest was for no purpose within the scope and power of the House Committee on Un-American Activities.

The Court: I think you have given me enough to give

Mr. Isserman: If you will hear me.

The Court: Make it very brief.

Mr. Isserman: I am trying to make it very brief; that he had no opportunity for full consultation with his counsel; that he was going to ask for an adjournment until the matter of his arrest had been cleared up, and that the purpose of subpoenaing him had no relevancy to any matter within the powers of the Committee; that the Committee had called him because of his political views, and to prevent his departure to Germany.

C. Undue intervention in examination and cross-examination.

It has already been indicated that in the course of reprimanding defense counsel the Court interfered substantially with the progress of the examination and cross-examination. Additional incidents of this prejudicial conduct are found in the record.

(a) At the most crucial portion of the appellant's direct examination, the Court intervened in a manner bound to give the jury the impression that the defendant was guilty (J. A. 131, 132):

Q. [By Mr. Isserman] Mr. Eisler, on February 6, 1947, when you were present before the House Committee on Un-American Activities did you at any time refuse to be sworn?

A. [By the defendant] No; I made repeated efforts to be sworn in.

By the Court:

Q. When you say you made repeated efforts to be sworn you mean you made offers to be sworn on condition—

A. (Interposing) Yes.

The Court: (Continuing)—that first you be given an opportunity to speak?

A. Correct.

Q. You did not make any unconditional offer to be sworn, did you?

A. It was conditioned if I would be allowed three minutes to speak I would unconditionally take the oath.

By Mr. Isserman:

Q. And did you tell the members of that Committee and the Chairman how long a period you desired in which to make a few remarks?

A. Many times; exactly three minutes.

The Government attorney would not have been allowed to interpose these questions in the course of direct examination of the defendant, as the Court did. The Court certainly did not act impartially when it addressed a leading question to the defendant and characterized his effort to make objections to the Committee proceedings before being sworn as a "condition" imposed by the defendant on the Committee's procedure.

(b) The appellant was explaining under cross-examination that if the hearing before the Committee had proceeded he would have answered those questions which he believed to be relevant. The Court intervened as follows (J. A 143):

By the Court:

Q. You mean you would have made yourself the judge?

A. [By the defendant] By no means, Mr. Judge. If the Committee would have told me, 'Certain parts of your biography are relevant,' and would have convinced me they are relevant, I would have given them also parts of my biography.

Thus an unfavorable impression was created before the jury, even though both Government counsel and Court knew that the defendant's obligations at the hearing before the Committee, had he been properly called and sworn to testify, would have been to answer only *pertinent* questions.

Further, defense counsel, on redirect examination, was not permitted to clarify this point before the jury. (J. A. 146, and see D, post).

(c) The Court assumed the prosecutor's role by a vigorous cross examination of the defendant, which closed the government attorney's cross examination (J. A. 145).

Q. [By Mr. Hitz] You never took the oath to testify, did you, Mr. Eisler?

A. [By defendant] I was prevented to take the oath by illegal proceedings of the Committee.

Q. You did not take the oath, did you?

By the Court:

Q. Answer yes or no.

A. I couldn't take the oath.

Q. Answer yes or no. Did you take the oath?

A. No, I didn't take the oath.

Mr. Hitz: No further questions.

(d) In the course of the trial and in the presence of the jury, and excluding rulings at bench conferences, the Court ruled on 52 objections made by Government counsel. At the same time, the Court on its own motion, without intervention of Government counsel, made 34 objections directed to the defense.³ Under these circumstances, the jury could not but be convinced that the Court was largely conducting the prosecution.

D. The Court erred in that it made inconsistent rulings on evidence prejudicial to appellant; it allowed the prosecution to examine on and argue concerning certain subjects, while denying to the defense the opportunity to introduce evidence thereon. (Point 3 on Appeal).

(a) The prosecution introduced evidence to show that counsel for appellant was present in the Committee hearing room (J. A. 26, 27). Testimony and prosecution argument

³ *Objections by prosecution:* Tr. 71, J. A. 49, 58, 59, 89, 92, 93, 94, 95, 96, 97(2), 98, 99, 100, 101, 106, Tr. 271, J. A. 108, 109, 110, 113, 115(2), 116(2), 117(2), 118(2), 119, 120, 121(2), 122, 123(2), 124(2), 125(2), 126, 128, 133, 134, 135(2), 138(3), 149(2). *Objections by the Court:* J. A. 34(2), 37(2), 38, 43, 58, 79, 82, 84, Tr. 204, 206, J. A. 86(2), 87, Tr. 214, J. A. 89(2), 94, 106, 107, 127, 128, 130-131, 132, 133, 138, 140, 145, 146(3), 160, 162.

also enabled the jury to infer that it was the proper function for counsel, and not a witness, to make a legal objection before the Committee (J. A. 49, 165). But the Court did not permit the defense to show that under committee practice counsel would not be permitted to speak (J. A. 107), and that counsel had therefore instructed the defendant to make his own legal objections (J. A. 146, 149, 150). We submit that this exclusion was prejudicial error because it eliminated evidence relative to the issue of whether the defendant had refused to be sworn or had merely tried to make an objection, and because it permitted an erroneous impression to be conveyed to the jury without opportunity to the defense for correction.

(b) The Court excluded evidence, offered by the defense, as to the contents of the three-minute statement that the appellant tried to make the Committee (J. A. 133-135). Although it ruled that this subject-matter was irrelevant, nevertheless, it permitted the prosecution, over objection, to argue its own version of what the defendant had intended to say (J. A. 166, 157).

(c) The defense was not permitted to introduce evidence that the appellant would have answered questions if he had been allowed to make his three-minute objection. (J. A. 121, 135). Yet the prosecution was allowed, over objection, to elicit answers on cross-examination designed to demonstrate that the appellant would not have answered questions even if he had been allowed to make his objections. Indeed, the Court even assisted the prosecution in this examination (J. A. 140-145). When the defense attempted to clarify what was obviously a damaging impression before the jury, the Court refused to allow the defense to show that the appellant would, as was his right, have answered pertinent questions while declining to answer questions beyond the Committee's authority (J. A. 146, 147).

E. The Court erred by refusing to permit defense counsel to object to Court's charge out of the hearing of the jury. (Point 4 on Appeal).

A further instance of prejudice was the trial Court's conduct in preventing defense counsel from objecting to its supplemental charge out of the hearing of the jury, despite counsel's express request for leave to approach the bench (J. A. 177).

Rule 30 of the Rules of Criminal Procedure provides in part:

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. *Opportunity shall be given to make the objection out of the hearing of the jury.* [Emphasis supplied.]

The purpose of the italicized sentence is obvious: to withhold from the jury knowledge of what portions of the charge counsel considers detrimental to his case. The Court's violation of this clear rule and its purpose is, in addition to evidence of bias, an independent ground for reversal.

F. Comments at the hearing on the motion for new trial.

(a) Certain remarks made by the Court at the hearing on the motion for new trial are unusually revealing. The following colloquy took place (J. A. 190):

Mr. Isserman: . . . We say that there is no circumstance, as far as we understand the cases, in which a defendant can be punished before the jury by rebuking his counsel in the jury's presence.

The Court: If counsel oversteps the bounds, I think the Court has a right to check counsel. *It is unfortunate that the defendant suffers.* But in this particular case the Court took care to explain to counsel at the bench conference the type of conduct and the type of manner that was expected. [Emphasis added.]

This exchange, coupled with the bench colloquy described in section B(d), *supra*, shows that the Court was fully aware that its reprimands of counsel before the jury injured the defendant. It also shows that the Court realized that it had threatened to make the defendant suffer for alleged (and, we assert, non-existent) misconduct of defense counsel, and that it had carried out the threat.

(b) The Court itself admitted that it had no feeling that counsel intended to be discourteous (J. A. 190), that the record did not divulge provocative conduct by counsel, and that the alleged misconduct merely "involved brusqueness of tone and matters of that kind" (J. A. 191).

(c) Throughout the hearing on the motion the Court displayed impatience. Thus when counsel referred to the Canons of Judicial Ethics, the Court stated (J. A. 198):

I suggest that you confine yourself to the law and not tell me that the Court violated judicial ethics. I think the Court is a better judge of that.

The Court also remarked (J. A. 201):

You gentlemen have taken almost three-quarters of an hour on this motion for a new trial. That is longer than we ordinarily give to motions for new trials.

For other manifestations of impatience, see J. A. 186, 191, 195, 198, 199, 200, 202, 203.

G. Concluding analysis.

When an American judge exhibits bias and unfairness in a case before him, he injures one of the most cherished of our institutions. When his prejudice is directed against an alien dissident, such as the defendant here, the injury is aggravated, for then, as in the Sacco-Vanzetti case, there is published to the world our domestic shame. The judge is, therefore, held to a high and unyielding standard in the execution of his oath of office. The first of the Canons of Judicial Ethics of the American Bar Association calls on the judge to be courteous to counsel. The fifth canon

requires that he be "temperate, attentive, patient, impartial." So important to the judiciary is the preservation of public confidence and respect that the judge must not only *be* impartial, he must *appear* impartial as well. *Whitaker v. McLean*, 73 App. D. C. 259, 118 F. (2d) 596. "The trial judge should be so impartial in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused." *Egan v. United States*, 52 App. D. C. 384, 397, 287 Fed. 958, 971.

The demonstration on appeal of trial court bias is customarily difficult, particularly when the bias is pervasive rather than exhibited in exaggerated outbursts. It is not often that, as in the *Whitaker* case, a judge uses a foul epithet in court. The record on appeal cannot convey the hostile tones of voice and attitudes, or the titters from the jury box, or the electrified atmosphere of the trial room. These intangibles existed in the trial of this case to an almost unbelievable degree, but they can be reconstructed on appeal only through the unsatisfactory medium of inference from a cold record. But the cold record here, we submit, is alone convincing that the trial Court exhibited an active bias, hostility and prejudice toward the defendant throughout the trial and in the sentencing. The trial judge was, when measured by the canons' requirements, discourteous to counsel, intemperate, inattentive, impatient, partial. He was not impartial and did not appear to be impartial. He discriminated in his treatment of the defense and the prosecution. He applied restrictive rules to the defense alone. He exacted retribution for fancied slights, as in refusing to entertain offers of proof. Under the guise of expediting the trial, he prolonged it by unnecessary harassing of counsel and petty bickering. He rebuked and ridiculed defense counsel without cause. He minimized defense evidence. His inconsistencies in ruling on admissibility of evidence were adverse to the defense. In his raising of objections and in his cross examination of the defendant he came close to conducting the prosecution. Worst of all,

this misconduct seems to have been, to some extent at least, intended. The record shows that the trial judge realized the effect his rebukes would have on the jury; he threatened defense counsel to that effect, and, after carrying out his threat, justified his action on the grounds that a defendant must suffer for his attorney's supposed lack of urbanity.

This conduct on the part of the trial judge deprived the defendant of the fair trial which is his constitutional right. The Court's expressions in the jury's presence cannot but have influenced the jury deeply. *Starr v. United States*, 153 U. S. 614, 626. The defendant was thus deprived of his Constitutional right to trial by jury. The Court's derogatory comments on defense evidence exceeded the permissible bounds of judicial comment, and invaded the province of the jury. *Starr v. United States, supra*, at 624, 625. Its excessive participation in the examination of defense witnesses, particularly in cross examining the defendant, and in making objections was prejudicial error. *Adler v. United States*, 182 Fed. 464; *Martucci v. Brooklyn Children's Aid Society*, 140 F. (2d) 732; *Williams v. United States*, 93 F. (2d) 685.

The trial Court justified some of its actions on the basis that defense counsel was provocative. This we deny, and the Court itself conceded that the record does not reveal as much. But even were such the case, it would not remedy the error. See *Lambert v. United States*, 101 F. (2d) 960 (C. C. A. 5th), holding that though prejudicial argument between Court and counsel resulted from the fault of counsel it was nevertheless ground for reversal. Cf. *Commonwealth v. Stallone*, 281 Pa. 41, 126 Atl. 56, in which the Court reversed for a display of feeling by the trial Court, stating that it did not matter whether the Court or counsel was responsible for the situation.

The present case is more extreme than the *Whitaker* case, *supra*, in which this Court reversed judgment (even while concluding that the appellant-plaintiff's claim was probably without merit) for a single remark made by the trial Court. That was a civil case, this a criminal case. In that case, the

Court's epithet was spoken out of the jury's presence. Nevertheless, this Court applied the rule that "a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial."

This case is more extreme, also, than *Egan v. United States*, 52 App. D. C. 384, 287 Fed. 958 (1923), in which the Court reversed on grounds indicated as follows (at 397, 287 Fed. at 971):

... these exceptions challenge the demeanor of the judge toward the defendant. While there is perhaps no single instance involving error so prejudicial as to warrant reversal, we are convinced that, considered as a whole, the rights of the defendant were so prejudiced thereby as to deprive him of that fair and impartial trial which the Constitution and the law of the land accords to every citizen accused of the commission of crime.

In the present case, any one of many instances would, standing alone, involve prejudicial error.

III. The Court Erred in Excluding Proffered Evidence that the Committee was Acting Improperly and Beyond the Scope of Its Authority. (Point 5 on Appeal).

The Court refused to permit the defense to prove that the House Committee on un-American Activities did not summon Eisler in order to elicit any information upon a matter of inquiry committed to it by Congress, but rather to harass and punish him for his political beliefs and to prevent his departure from the United States and his return to Germany; and that the Committee acted for ulterior motives not within the scope of its or Congress' powers. (J. A. 101, 102, 104, 119, 120).⁴

⁴ We may note that clear indications that such were the Committee's purposes appear in statements made by a majority of its members on the House floor. See 93 Cong. Rec. 1177-1180 (Rep. Nixon), 1181-1182 (Rep. Rankin), 1182-1184 (Rep. Bonner), 1184-1186 (Rep. Mundt), 1186-1187 (Rep. Vail). Thus Rep. Nixon stated (at 1180): "The resolution [to cite Eisler for contempt] before the House today proposes a very simple and direct question. By adopting the report of our committee concerning an obvious contempt, this House can put Mr. Eisler out of circulation for a sufficient period of time for the Department of Justice to proceed against him on more serious charges."

The Supreme Court has repeatedly held, however, that Congress' power to investigate and to compel testimony is limited to an inquiry in aid of the legislative functions. *In re Chapman*, 166 U. S. 661; *Sinclair v. United States*, 279 U. S. 263; *Kilbourn v. Thompson*, 103 U. S. 168; *McGrain v. Daugherty*, 273 U. S. 135; *Journey v. MacCracken*, 294 U. S. 125. The contempt statute reaches no further than Congress' constitutional power, and does not punish the withholding of testimony Congress may not validly exact. *Sinclair v. United States*, *supra*; *In re Chapman*, *supra*. It is clear in each of the cited cases that, as stated by Mr. Justice Brandeis in *Journey v. MacCracken*, *supra*, at 147, "assertions of Congressional privilege are subject to judicial review." Thus in the *Sinclair* case the Supreme Court acknowledged the right of a defendant prosecuted under the very contempt statute here involved to introduce evidence to show that the investigation, which he frustrated by his refusal to answer questions, was "avowedly not in aid of legislation" (at 295).

By excluding such evidence in the present case, the trial Court held that action of a Congressional committee cannot be challenged or reviewed. The Court stated (J. A. 120):

"I have to assume, and I shall assume, that the Committee was making an investigation for proper purposes within the power of Congress;" This denial of the right to judicial review flouts the numerous Supreme Court decisions to the contrary. It is a violation of due process of law, contrary to the Fifth Amendment, since it sanctions the harassment and persecution of individuals for political purposes by a legislative committee. Since Colonial times Americans have been fearful of Star Chamber proceedings and insistent on judicial protection against unwarranted inquisition. See *Jones v. S. E. C.*, 298 U. S. 27, 28. Congressional committees, as any sophisticated person realizes, sometimes abuse their powers; sometimes they act for partisan purposes; sometimes their "hearings" are not investigations at all but rather devices for obtaining pub-

licity, spreading propaganda, and slandering political opponents. See 8 *Wigmore, Evidence* (3d ed.) § 2195, p. 80.

Apprehensions of such conduct were voiced in Congress when the contempt statute was being debated, but were met by assurances that individuals would be protected by the judiciary's review of the legislative inquiry. See 26 Cong. Globe 439, 440, 34th Cong., 3d Sess., remarks of Senator Bayard.

IV. The Court Prevented the Defense from Proving, and the Jury from Finding, Matters of Proper Defense.

A. The Court erred in that its charge was equivalent to directing a verdict of guilty. (Point 6 on Appeal).

The position of the prosecution was that the appellant had refused to be sworn except on his own conditions. The position of the defense was that the appellant had not made such a qualified refusal, but had merely attempted to state a legal objection to being sworn—as was his right. This raised an issue for the jury. The Court, however, refused to give requested charges which would have submitted this issue to the jury (J. A. 180, requested charges 17, 18, 19, 20, 21). Instead, its charge at once found that there had been a refusal to take the oath and mis-stated the defense position. The Court stated in its charge (J. A. 173):

In this case it appears that the defendant was requested by the Chairman to take the oath several times, *but on each occasion the defendant either refused categorically or refused except on certain conditions, that he specified . . .*

As I understand it, *the defendant contends that he wanted an opportunity to make a statement concerning his arrest before he was sworn.* The law is that a witness does not have the legal right to dictate the conditions on which he will or will not take the oath as a witness, or the conditions on which he will or will not testify. [Emphasis added.]

When the Court's attention was called to the misstatement of the defense position, apparent in the second para-

graph of the above excerpt, it agreed to supplement the charge (but only after the prosecuting attorney had joined in the defense request for clarification) (J. A. 175, 176). The supplemental charge was as follows (J. A. 177):

Ladies and gentlemen: I am going to expand one little statement that I made to you. I have stated that the defendant contends that he wanted an opportunity to make a statement concerning his arrest. In order that there may be no ambiguity, I am going to read to you what the defendant said on the witness stand concerning this matter. . . .

He was asked: 'Why did you ask the committee for 3 minutes to make some remarks before you would be sworn on the morning of February 6?'

His answer was on this witness stand: 'Because I had objection against the whole, what I considered unlawful proceedings of this committee against my person.' This states his contention in his own words; *but I want to repeat again that a witness does not have the legal right to dictate the conditions on which he will or will not testify, or to insist on making a statement as a condition of taking the oath as a witness.* [Emphasis supplied.]

It is apparent that the portion italicized in this excerpt effectively nullified any correction made by the Court in its statement of the defense position. But even were this not the case, the supplemental charge did not in any manner cure the error of the Court's *finding* (first paragraph of preceding excerpt) that the appellant had refused to take the oath. This issue was in contest, and the jury had to find it to return a verdict of guilty, whether or not the defense position was accurately stated.

This finding of fact by the Court, coupled with the instruction that the appellant could not lawfully condition his willingness to take the oath, removed from the jury the major issue of fact and was a direction of a verdict of guilty. The misstatement of the defense position further aggravated the situation.

B. The Court erred by excluding proffered evidence that the appellant merely attempted to make a legal objection to his being sworn by the Committee. (Point 7 on Appeal).

The Court also erred by refusing requested charges to the effect that the jury should acquit if it found that the appellant had merely attempted to make a legal objection to the Committee's requiring him to be sworn and to testify. (Point 8 on Appeal).

The record shows that the defendant insisted on being permitted to make a three-minute statement before taking the oath to testify before the Committee, and that he also stated that he was not refusing to be sworn. The appellant attempted to show at the trial that in fact he had not refused to be sworn, but had merely attempted to raise legal objections to being sworn and to being required to testify. Various items of evidence offered for this purpose were excluded by the trial Court, including evidence of the contents of the intended three-minute statement (J. A. 133, 134, 138, 139). This statement, described in appellant's offer of proof (J. A. 134, 135), was an assertion of such objections. Other such excluded evidence was testimony offered to show that appellant's counsel had advised him that appellant (and only appellant) had a right to make such objections (J. A. 122, 126, 133, 146, 149, 150), that appellant believed he had basis for objection (J. A. 199, 120), and that he would have taken the oath and testified after he had made his objections (J. A. 135). The trial Court denied appellant's requests for charges to the effect that the jury must acquit if it found that the appellant merely attempted to make legal objections to being sworn and to being required to testify (J. A. 180, requests 19, 20). These exclusions of evidence and denials of requested charges were in error.

Even if a qualified refusal to be sworn is a default of appearance under the statute (see *post* section V, for our contention to the contrary), the defendant must still be permitted to prove that he did not in fact so refuse, and the

factual issue must be left to the jury. If the defendant was merely trying to make legal objections, obviously there was no refusal to be sworn, and hence no default, much less "willful" default, even utilizing the Court's definition of "willful" as merely voluntary. That a witness has the right to object to questions either directly or through counsel is elementary due process. Assertion of that right cannot "obstruct the performance of the duties of the legislature" and is therefore not Constitutionally punishable. (*Jurney v. MacCracken*, *supra*, at 147). Representative Thomas, chairman of the Committee, himself testified in effect that it was proper procedure for a person appearing at a Committee hearing to make legal objections *before* complying with the request objected to (J. A. 49). The defendant certainly cannot be held to have defaulted if all he tried to do was to conform to the practice recognized by the Committee as proper.

C. The Court erred in excluding proffered evidence that the appellant had, at the Committee's request, been unlawfully arrested and brought in custody to the Committee hearing. (Point 9 on Appeal).

The Court excluded evidence offered to show that the defendant was, at the Committee's request and instigation, unlawfully arrested. The evidence excluded was: (1) that Eisler was, as the Department of Justice knew, an Austrian, not a German, national, and hence not an enemy alien (*United States ex rel. Schwartzkopf v. Uhl*, 37 F. (2d) 891); (2) that no warrant was in the possession of the arresting officers or served on the appellant; (3) that the government had previously abandoned any further arrests or internments of enemy aliens; and (4) that the purpose of the arrest was to bring the appellant to the Committee hearing in custody and to punish him for his political beliefs (J. A. 79, 80, 82, 87, 88, 89, 90, 91, 98, 100, 101, 102, 108, 109, 117, 118, 124, 213, D. Ex. 1 for Id.).

A Congressional committee's subpoena powers do not, of course, comprehend the power to order the arrest of pros-

pective witnesses and their forcible appearance before the committee. Nor should the courts lend themselves to so palpable an abuse of process. A witness who is unlawfully arrested and unlawfully brought before a committee against his will does not voluntarily appear and cannot be punished for contempt for refusing to testify. *United States v. Dolsen*, U. S. D. C., District of Columbia, Criminal No. 65801, decided June 20, 1946, also involving illegal conduct of the House Committee on Un-American Activities.

We submit that due process of law, guaranteed by the Fifth Amendment, and freedom from unreasonable search and seizure, guaranteed by the Fourth Amendment, prevent the punishing for refusal to testify of one who, as here, has been at the Committee's instigation illegally arrested, jailed and hauled before it.

D. The Court erred in excluding proffered evidence relative to appellant's good faith and lack of a bad purpose. (Point 10 on Appeal).

The Court erred in refusing to charge that the jury must acquit unless it found that the appellant had an evil intent in refusing to be sworn and that "willfully" means with a bad purpose and evil intent. (Point 11 on Appeal).

The Court erred in charging the jury that "willfully" required only that the appellant had acted intentionally and deliberately, as contrasted with accidentally and inadvertently. (Point 12 on Appeal).

The contempt statute, of course, punishes a default of appearance only if made "willfully." The trial Court construed this term as requiring only that the default be voluntary as distinguished from accidental or inadvertent; it rejected any construction that the term implied bad faith or a bad purpose. This issue as to the construction of the statute arose in several applications; the charge to the jury defining the term (J. A. 172), the refusal to grant defendant's requested charges on the subject (J. A. 78; requests

4, 3 and 7); and the exclusion of evidence proffered for the purpose of showing good faith.⁵

This Court has just sustained the statutory construction here objected to in *Fields v. United States*, No. 9486, October 27, 1947. We consider the *Fields* decision erroneous on the basis of *United States v. Murdock*, 290 U. S. 389; *Hartzell v. United States*, 322 U. S. 680; *Screws v. United States*, 325 U. S. 91; and the legislative background (see 34 Cong. Globe 405, 406, 34th Cong., 3d Sess., remarks by Representative Orr), none of which was considered in the *Fields* opinion. While saving this point, we are unable to brief it because of limitations of space.⁶

E. The Court erred in excluding proffered evidence that the appellant was, at the time he appeared before the Committee, an alien in transit detained in this country against his will. (Point 13 on Appeal).

The Court excluded evidence offered to show that the appellant's status in this country was that of an alien in transit, that his presence in the United States was involuntary, and that despite his repeated efforts to obtain permission to leave the country, he was detained here by government authorities against his will (J. A. 95-98, 115, 116).

⁵ The specific exclusions referred to are as follows: exclusion of evidence of what occurred when appellant appeared before the Committee on November 22, 1946, pursuant to an earlier subpoena (J. A. 118, 119); exclusion of evidence of appellant's belief as to whether the purpose of the Committee in calling him was to prevent his departure from Germany (J. A. 119, 120); exclusion of evidence as to whether appellant had, at the time he was served with the subpoena, the intention of appearing in response thereto (J. A. 121); exclusion of evidence as to the advice he received from his counsel on his legal rights before the Committee, including his right to make objections (J. A. 122, 126, 133, 146, 149, 150); exclusion of evidence as to his conception of his legal rights (J. A. 146); exclusion of evidence of what he had intended to say to the Committee in his requested 3-minutes for remarks and that he merely intended to make certain legal objections to being required to be sworn and testify (J. A. 133, 134, 135, 138, 139). The trial Court prevented the defense from clarifying the record for appeal purposes, by prohibiting offers of proof with respect to most of the exclusions listed. We submit that the rulings preventing offers of proof were innovations without any basis in law.

⁶ Appellant's motion for leave to file an 80 page brief was granted for 60 pages.

The authority of the House Un-American Activities Committee to investigate can constitutionally extend only so far as its inquiries are in aid of the formulation of valid legislation. *Kilbourne v. Thompson*, 103 U. S. 168; *McGrain v. Daugherty*, 273 U. S. 135; *In re Chapman*, 166 U. S. 661; *Jurney v. McCracken*, 294 U. S. 125. In view of the nature of the jurisdiction assigned to the committee; no other power of Congress or of either House (as, for example, a House's power to determine the qualifications of its members) can possibly justify the committee's inquiries.

To require the defendant to assist Congress to formulate legislation would be in violation of international law. Each person owes primary allegiance to the state of which he is a citizen or subject. When present in a foreign country, he is, as stated by Justice Field, "bound to obey all the laws of the country, *not immediately relating to citizenship*, during...sojourn in it." Though his "absolute and permanent allegiance" is to his own sovereign, he owes to the country of residence "a local and temporary allegiance." *Carlisle v. United States*, 16 Wall. 147, 154 (emphasis added); *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 144; *United States v. Wong Kim Ark*, 169 U. S. 649, 693.

The numerous cases holding aliens subject to domestic laws involve application of the police or regulatory power. The duty to assist the formulation of legislation, however, is clearly a requirement of *allegiance*, not of the police power. It is thus distinguishable from a duty to testify in court as a witness, say, to a crime committed in the country of residence. It is an obligation which "immediately relates to citizenship", to use Justice Field's phrase. One who cannot help to elect the legislators should not be required to help them legislate.

It may be that an alien domiciled in this country has a sufficient nexus with our government so that he, within his "local and temporary allegiance," owes assistance to the legislative process. But to impose such an obligation on a transient alien, particularly one whose stay has been com-

pelled by the very government seeking to impose the duty, seems clearly a requirement of allegiance which cannot be justified under the law of nations.

A clear analogy exists in the obligation, which arises from *allegiance*, to protect the state by taking up arms in case of war. The duty of assisting the government to formulate legislature is comparable to the duty of protecting the government from enemy action.

It is an accepted rule of international law that aliens do not owe to the state in which they reside the duty of bearing arms in its defense. Aliens are not, therefore, subject to compulsory military service without violation of international law. 4 Moore, *International Law Digest* (1906) sec. 548, collecting precedents; 3 Hackworth, *Digest of International Law* (1942) sec. 281.

This nation has recognized this principle as regards aliens resident within its boundaries. It has insisted that foreign nations recognize it as regards American citizens resident abroad, as in 1804 when the State Department vehemently protested British impressment of American citizens in Great Britain. 4 Moore, *International Law Digest* (1906) 52.

Congress has infringed on this principle in minor respects in the selective service acts occasioned by World Wars I and II, by subjecting to the draft alien residents who have declared their intention to become American citizens. Even this infringement, limited as it was to residents, not transients, and to those who had already taken steps to change their allegiance, aroused vehement protests from sister states and caused our Executive embarrassment. See 3 Hackworth, *Digest of International Law* (1942) 602 ff.

Suppose an American citizen en route to France, touched at an English port, or visited in England temporarily. Surely the House of Commons could not, without violating international law, compel him to testify in order to assist Parliament to determine British foreign or domestic policy. Still less could it compel him to testify regarding actions

and policies of the United States government. We can imagine the indignation which such a procedure would inspire in this country, and the representations which would be made by our State Department of violations of international law. Or can we suppose that on Winston Churchill's recent visit to this country, he could have been compelled to testify before a Congressional committee to assist the formulation of federal legislation? And would not such an attempted inquisition of Mr. Churchill have seemed particularly outrageous if it dealt with the actions and policies of foreign governments, perhaps even including his own?

Doubtful as the case may be with respect to aliens who have taken up residence in this country of their own accord it seems incredible that the committee can exact testimony to aid legislative formulation from an alien in transit through this country or on a temporary visit. Still less can the committee exact such testimony from an alien who has been detained in this country against his will and who was produced to the committee as a prisoner.

We are not to suppose that Congress meant to violate the law of nations except upon the clearest showing of such a legislative intent. No such intent appears in the definition of the Committee's jurisdiction, and it follows, therefore, that the Committee had no power to compel the defendant's testimony. This being the case, the appellant did not violate the statute, since it is only as broad as the power of inquiry it protects. *In re Chapman*, 166 U. S. 661; *Sinclair v. United States*, 279 U. S. 263; *Townsend v. United States*, 68 App. D. C. 223, 95 F. (2d) 352, cert. denied, 303 U. S. 664.

V. The Indictment Does Not Allege a Violation of the Statute, nor was a Violation Proved.

A. The Court erred in denying the motion for judgment of acquittal, since there was insufficient evidence to go to the jury. (Point 14 on Appeal).

1. *There was no proof that the Committee sought any testimony from the appellant upon matters of inquiry committed to it.*

The indictment alleged that the appellant was "summoned as a witness . . . to give testimony before the . . . Committee . . . *upon matters of inquiry committed to said Committee . . .* and was directed to be sworn to testify *on said matters . . .*" (emphasis supplied.)

The allegations italicized were essential portions of the indictment and had to be proved. In *Sinclair v. United States, supra*, involving a prosecution under the same statute, the Supreme Court expressly recognized the need for pleading and proving that the testimony sought was pertinent to an authorized inquiry of the Congressional Committee. The Court stated (at 296, 297):

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the Committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation.

In the present case, no evidence whatever was produced to show that the appellant was summoned on a matter of inquiry committed to the Committee. Hence there was a fatal defect of proof, and the Court should have entered a judgment of acquittal.

2. *The proof does not establish that the appellant refused to be sworn.*

The indictment alleged that the appellant "refused to be sworn to testify." The uncontradicted evidence shows that the defendant wished to make a legal objection to being sworn and to being compelled to testify, and that having made such objection, he was willing to be sworn and to testify (J. A. 43-47, 133). Representative Thomas, witness for the Government, admitted that he did not know that the defendant's requested three minutes would not be devoted to make a legal objection (J. A. 50). Representative Thomas also admitted that the defendant had a right to make a legal objection before being sworn (J. A. 49). The record shows, therefore, that the defendant wished to make a legal objection before being sworn and that he had a right to make such objection. This record cannot support a finding of either a default or a willful default.

3. *As an interned enemy alien, the appellant could not be required to testify before the Committee.*

It was stipulated that the defendant had been arrested and was in custody as an enemy alien at the time he appeared before the Committee (J. A. 80, 81).

An interned enemy alien is entitled to all the rights of a prisoner of war. *Basic Field Manual, FM 27-10, Rules of Land Warfare; Law of Land Warfare prepared at Judge Advocate General's School at p. 47; United States Department of State Bulletin; vol. VI, No. 152, p. 445, 446, May 23, 1942; 2 Hyde, International Law 1862; 2 Oppenheim, International Law (6th Edition, Lauterpacht) §127, pp. 299-300; Flory, Prisoners of War, 24-27; Wilson, Treatment of Civilian Alien Enemies, 37 American Journal of International Law 30 (1943); United States War Department Mobilization Regulations, No. 1-11 (1 April 1940) p. 3; Rex v. Commandant of Knockaloe Camp (Ex. parte Forman), 117 Law Times Reports 627 (1917); King v. Supt. of Vine St. Police Station, 1 KB 268 (1916).*

Since the Court prevented the defense from making an offer of proof on the question (J. A. 109, 110), it must be accepted for the purposes of this record that the Alien Enemy Control Unit of the Justice Department, which had supervision and control over enemy aliens arrested under Presidential warrants (J. A. 108), accorded to persons in custody as enemy aliens the rights guaranteed to prisoners of war by the Geneva Convention. (J. A. 109, 110).

As one having the status of a prisoner of war, the defendant could not be required to testify as to anything other than his "name, rank or regimental number," none of which was of consequence to the Committee. *Geneva Convention on Prisoners of War*, Article 5; *Law of Land Warfare* at p. 58; *Spaight, "Air Power and War Rights"* 340; 2 *Oppenheim, op. cit.* § 126 a., p. 294. We submit that the statute should not be applied to violate a treaty and accepted principles of international law.

B. The Court erred in denying the motion to dismiss the indictment, since a refusal to be sworn is not a "default." (Point XV on Appeal).

The "default" contemplated by the statute, and for which appellant was indicted, is a default of *appearance*. *Townsend v. United States*, 68 App. D. C. 223, 227, 228, 95 F. (2d) 352, 356, 357, cert. denied, 303 U. S. 664.

"Default," of course, refers to a breach of duty (Black's Law Dict. (3d ed. 1933) 539), and we must look to the context to determine the duty involved. Here the duty is indicated in the text by the words "summoned" and "who, having appeared." This comports with lawyers' jargon, in which "default" refers to a failure or omission to plead or appear. *Ibid.* 3 Coke on Littleton, c. 7, sec. 438. Cf. 3 Bl. Comm. *396. Such was the meaning assigned to "default" by decisions contemporary with the legislation. *Page v. Sutton, Orlopp & Co.*, 29 Ark. 304, 306 (1874); *Covart v. Haskins*, 39 Kan. 571, 574, 18 Pac. 522 (1888). So too the contemporary lexicon. 3 Oxford Eng. Dict. (1933) 126, quoting the 1828 Webster.

Although, as held in the *Townsend* case, the duty to appear comprehends the duty to attend, there is no authority of any kind, case or lexicon, which includes in a duty to appear an obligation to take an oath. In view of the settled necessity of giving a strict construction to a penal statute, the statute cannot be extended to embrace the latter obligation.

A limited construction is likewise appropriate in view of the availability of alternative proceedings. Either House of Congress may cite or punish for a contempt directly whether or not the conduct is subject to the statutory remedy, and the direct sanction has been frequently employed. *Jurney v. MacCracken*, 294 U. S. 125; *Barry v. United States ex rel. Cunningham*, 279 U. S. 597; *McGrain v. Daugherty*, 273 U. S. 135.

If the indictment, as worded, states an offense, then one who for conscientious scruples insisted on affirming rather than swearing could likewise be indicted and convicted, since the indictment does not negative a willingness to affirm. Aside from the constitutional question raised by such a result, the statute should clearly not be so construed.

VI. The Court Erred in Denying the Motions to Dismiss the Indictment and for Arrest of Judgment, Since the Authority of the House Committee on Un-American Activities, on Its Face and as Applied, is Unconstitutional, and Since the Contempt Statute Cannot be Constitutionally Applied to Punish the Withholding of Testimony from the Committee. (Point 16 on Appeal).

The unconstitutionality of the Committee's authority is a defense in this proceeding. The statute does not punish withholding of testimony from an invalid inquiry. *In re Chapman*, 166 U. S. 661; *Sinclair v. United States*, 279 U. S. 263; *Jurney v. MacCracken*, 294 U. S. 125.

A. The Act establishing the Committee places no limits on its authority to investigate "propaganda."

The authority of the Committee on Un-American Activities is, stated shortly, to investigate "subversive and un-American" propaganda (Appendix A(c), *post*). The key words of this authorization, "subversive" and "un-American," have no meaning which is even approximately definite in usage, the dictionary or judicial construction. Instead, they are commonly used as epithets of opprobrium for whatever political, social, or moral ideas are distasteful to the user. *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416, 417 (hereinafter cited as "Note"). Hence the Committee's authority is confined only by the subjective desires and prejudices of its members.

"Propaganda" is a word that refers to a dissemination of ideas, and "un-American" propaganda must therefore refer to ideas which are foreign or antagonistic to "American" ideas or beliefs. But it is impossible to develop a legal concept that certain ideas are "American", while others are "un-American." America is the great melting pot of ideas and cultures, as well as of nationalities. Which are "American" and which "un-American"? The ideas of Hamilton or the ideas of Jefferson? Of Lincoln or of Jefferson Davis? Of Franklin D. Roosevelt (whom many have labelled as "un-American") or of Landon? Of the Tories or of Tom Paine? Of Robert Ingersoll or of Mary Baker Eddy? Of Senator Taft or of Eugene Dennis? Of Wilson, an internationalist, or of Lodge, an isolationist? Of Brandeis (whom Boston once regarded as "dangerous") or of McReynolds? Of Mississippi, which elects Bilbo and Rankin, or of Harlem, which elects Adam Clayton Powell?

In the political field our tradition is one of turbulence, disagreement, and even rebellion. One of our most eminent historians has recently written as follows (Henry Steele Commager, *Who Is Loyal to America?*, Harper's Magazine, Sept. 1947, 193, 196):

True loyalty may require, in fact, what appears to the naive to be disloyalty. It may require hostility to certain provisions of the Constitution itself, and historians have not concluded that those who subscribed to the 'Higher Law' were lacking in patriotism. We should not forget that our tradition is one of protest and revolt, and it is stultifying to celebrate the rebels of the past—Jefferson and Paine, Emerson and Thoreau—while we silence the rebels of the present. 'We are a rebellious nation,' said Theodore Parker, known in his day as the Great American Preacher, and went on: 'Our whole history is treason; our blood was attainted before we were born; our creeds are infidelity to the mother church; our constitution, treason to our fatherland. What of that? Though all the governors in the world bid us commit treason against man, and set the example, let us never submit.'

This is the concept of Americanism held by a conservative professor of history at Columbia University. The concepts of Mr. J. Parnell Thomas and Mr. John Rankin are notoriously different. Congress, we affirm, may not compel obeisance to the latter concepts. "Americanism," our history demonstrates, includes diverse and conflicting strains of political, social and economic thought, largely derived from foreign sources. Cf. Parrington, *Main Currents of American Thought* (1927), *passim*. If, therefore, anything is genuinely "un-American," it is an attempt by a governmental body to compel conformity. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by words or deed their faith therein." *Board of Education v. Barnette*, 319 U. S. 624, 641, 642.

As to the word "subversive," that refers to the "overturning" of something. The question then arises, the overturning of what? To this the statute furnishes no guide. What is referred to is, perhaps, propaganda designed to overturn "American" ideas, which leaves us in our pre-

vious dilemma. In any event, whatever "subversive" means, the Committee can always justify an inquiry by relying upon the adjective "un-American."

Where statutory terms are obscure, it is customary to resort for clarification to legislative debates and to administrative practice. The debates on the renewal of the Committee's authority, since its origin in 1938 as a select committee, fail to supply any content to the terms "un-American" and "subversive." On the contrary they indicate the legislature's full awareness of the lack of meaning of the terms. (See Note, pp. 421, 422).

Thus Representative Johnson plaintively said: "What I should like to find out is what is un-American. I cannot seem to get anybody on the committee to give us a definition of that." C. R., 75th Cong., 1st Sess. 3285. On July 18, 1946, the chief counsel of the Committee wrote Representative Doyle: "The Committee has adopted no definition of subversive or un-American activities." 92 C. R. App. 5013 (1946). Mr. Doyle commented:

This illustrates that there can be at present as many definitions of 'subversive and un-American' as there are committee members. In fact, I think I notice that there is sharp difference of opinion expressed by committee members on this point. [92 C. R. App. 5012, 5013 (1946)].

The Committee's own construction of its authority should be particularly informative, because Congress' re-enactments of the Committee's powers would normally constitute a legislative acceptance of the Committee's views and practices.⁷ We find, however, that the Committee has never defined "un-American" or "subversive." On the contrary, its reports, statements of its members, and its investi-

⁷ The Committee, it should be noted, had its origin in 1938, was renewed each year till 1945, was made a standing committee in that year, and was retained as a standing committee by the Legislative Reorganization Act of 1946. (Note, p. 417). The investigative authority of the permanent Committee is identical with that of its predecessors, and in referring to the Committee practices and expressions, we shall henceforth treat the predecessor Committees as one with the present Committee.

gative activities demonstrate that it considers itself bound only by its own concepts of what is distasteful. Thus the Committee has regarded the following attitudes as un-American: opposition to the American system of checks and balances, opposition to the protection of property rights, belief in dictatorship, opposition to Spain's Franco government, opposition to General MacArthur, advocacy of a world state, advocacy of the dissolution of the British Empire, criticism of members of Congress, and criticism of the Committee on Un-American Activities. (Note at 418, 422, 423.)

We are thus left with this conclusion: the words "un-American" and "subversive" (the latter being without a predicate) have no meaning in usage, legislative history, or administrative practice from which either the Committee or the courts may derive a standard which can be applied in law. The Committee, therefore, is free to investigate whatever expressions it pleases, with no limits whatsoever.

B. The Committee, acting under its unlimited authority of inquiry, may and does impose political censorship of opinion and expression.

The Committee's roving commission makes it an agency which can and does use investigative powers for political censorship.

No one has been franker than the Committee itself in stating its purpose. This purpose is to effectuate through "exposure" a censorship by intimidation. Congressman Dies, the Committee's first chairman, stated on the floor of the House when the Committee was first authorized: "I am not in a position to say whether we can legislate effectively in relation to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession . . ." 91 Cong. Rec. 275 (1945). Three different Committee reports have emphasized the same point as follows:

While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate, com-

munism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities. . . . (H. R. Rep. No. 2, 76th Cong., 1st Sess. 13 (1939)).

This committee is the only agency of Government that has the power of exposure . . . There are many phases of un-American activities that cannot be reached by legislation or administrative action. (H. R. Rep. No. 1, 77th Cong., 1st Sess. 24 (1941)).

The House Committee on Un-American Activities is empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts and our American future. . . . (H. R. Rep. No. 2742, 79th Cong., 2d Sess., 16 (1947)).

Not content with suppression of speech and ideas by "exposure," the Committee resorts to the devices of black-listing individuals whose views it condemns and subjecting them to economic discrimination. The Committee has openly stated its purpose and attempts to eliminate from both public and private employment persons who advocate the ideas it condemns. (9 Hearings 5447 (1939): Note, p. 418. Cf. Gellhorn, *Cry Shame*, New Republic, Oct. 6, 1947, pp. 20, 21.) The Supreme Court has recognized the Committee's responsibility for legislation unconstitutionally black-listing for federal employment named persons. *United States v. Lovett*, 328 U. S. 303, 308.

In the pursuit of its intention of depriving political dissidents of employment, the Committee has compiled a black list of over one million names of persons and organizations. (Note, pp. 418, 419). It acts as a bureau of Congress serving as a clearing house for other agencies interested in discovering allegedly "subversive" and "un-American" individuals, much as the F. B. I. supplies a clearing house for finger printing. (See remarks of Congressman Dies, 87 Cong. Rec. 897 (1941)). Representative Rankin has said of the Committee, of which he is a leading member: "I serve notice on the Un-American elements in this country now that this 'grand jury' will be in session to investigate un-

American activities at all times." 91 Cong. Rec. 275 (1945).

The Committee has officially attributed its compilation of its black list to its subpoena powers. H. R. Rep. 2748, 27th Cong., 2d Sess. 1943, p. 213.

C. Constitutional provisions violated.

From the foregoing it follows that the Committee's authority and its exercise thereof violate provisions of the Constitution.

(1) The First Amendment is violated since the authority permits, and is used for, the regulation and suppression of thought and expression without any limitation that there must exist a "clear and present danger" of a substantive harm which Congress may directly prevent. *Bridges v. California*, 314 U. S. 252; *Thornhill v. Alabama*, 310 U. S. 88; *DeJonge v. Oregon*, 299 U. S. 353; *Near v. Minnesota*, 283 U. S. 697; *Schenck v. United States*, 249 U. S. 47. Since the Committee's authority represents an attempt to establish conformity and orthodoxy of opinion, it is invalid. *Board of Education v. Barnette*, 319 U. S. 624, 641, 642. It is immaterial that the censorship thereunder is committed by "exposure" and blacklisting rather than by a more direct prohibition against expressions of opinion. The Bill of Rights cannot be circumvented by use of indirection. Cf. *Grosjean v. American Press Co.*, 297 U. S. 233; *Murdock v. Pennsylvania*, 319 U. S. 105.

(2) Article I, section 9 of the Constitution is violated. Legislative action causing a person to lose his employment on account of political opinions and affiliations is a bill of attainder (*United States v. Lovett*, 328 U. S. 303), and such is a function of the Committee.

(3) The Committee's authority exceeds the reach of Congressional legislation. No enumerated power of Congress gives an authority to "expose," to censor opinion and expression, or to blacklist individuals for political and economic views. Hence the Committee's authority violates the Ninth

and Tenth Amendments. *Kilbourn v. Thompson*, 103 U. S. 168; *McGrain v. Daugherty*, 273 U. S. 135; *Jurney v. MacCracken*, 294 U. S. 125; *Sinclair v. United States*, 279 U. S. 263; cf. *Marshall v. Gordon*, 243 U. S. 521.

(4) The availability and use of process to compel testimony, without adequate, foreknown standards for the inquiry, violates the Fourth Amendment's prohibition of unreasonable searches and seizures. *Jones v. S. E. C.*, 298 U. S. 1, 25, 26, 28.

This Committee's authority and conduct fall squarely within the constitutional prohibition described in *Re Pacific R. Commission* (C. C.) 12 Sawy. 559, 32 F. 241, from which the following passage (at 263) was quoted with approval in the *Jones* case, *supra* (at 27):

A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end.

(5) Nor can the Committee's authority be saved by any judicial construction narrowing its jurisdiction, or because some of its inquiries may be within the Congressional powers. So drastic a concept of separability has never been employed, and would be contrary to the essential legislative purpose of giving the Committee uncontrolled discretion. The legislation contains no ascertainable standards to which the Committee may be confined by judicial interpretation, and an attempted saving construction would usurp the legislative function. *United States v. Reese*, 92 U. S. 214, 221. And since the record in this case is devoid of any evidence of the Committee's purpose in summoning

the appellant, no such construction could in any event be here applied.

The authority for investigation falls as a whole when too broad for constitutional requirements, and particularly where the First and Fourth Amendments apply, since the very generality of the jurisdictional statement offends their principles. *Jones v. S. E. C.*, 298 U. S. 1, 27:

An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of facts. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light.

See also *Thornhill v. Alabama*, 310 U. S. 88, 97; *Stromberg v. California*, 283 U. S. 359, 369, 370.

(6) The Committee's authority is also invalid because it represents a delegation of Congress' powers unaccompanied by adequate standards. Cf. *Panama Refining Co. v. Ryan*, 293 U. S. 288.

(7) Finally, the contempt statute cannot be applied to punish the withholding of testimony from the House Committee without violating the requirement of the Fifth Amendment that a penal statute must establish reasonably definite and ascertainable standards of guilt. Cf. *M. Kraus & Bros. v. United States*, 327 U. S. 614 (a statute penalizing violation of an indefinite regulation cannot be constitutionally applied). The statute punishes only the withholding of pertinent testimony; and since no one can fairly say, because of the vagueness of the Committee's authority, what is or is not pertinent to the Committee's jurisdiction, the criminal penalty cannot be applied. Cf. *Connally v. General Construction Co.*, 269 U. S. 385; *Lanzetta v. New Jersey*, 306 U. S. 451; *United States v. Capital Traction Co.*, 34 App. D. C. 592.

CONCLUSION.

The appellant is a European anti-Fascist, a Communist, who in his vicissitudes as a political refugee from Hitlerism was detained in this country by accident and against his will. The House Committee on un-American Activities, in its campaign to censor political opinion and expression, procured his unlawful arrest and imprisonment, with the cooperation of the Attorney General. When he was brought in humiliating custody before the Committee, he sought three minutes to express objections to what he considered "unlawful proceedings of this Committee against my person" (J. A. 133). He was denied that opportunity. Thereupon he was, at the Committee's recommendation, cited for contempt by the House, following a debate which candidly revealed that the purpose of the proposed prosecution was not to vindicate the House's privileges, but instead to give the Department of Justice time to try to dig up a criminal case against him and to prevent his return to Europe (see footnote 4, *supra*). The debate revealed the intention of the Committee to "serve notice" on others who held opinions condemned by it that they would run like risks of persecution. 93 C. R. 1187 (1947). He was then denied his day in Court by being subjected to an unfair trial.

The issue here is not merely whether Gerhart Eisler should go to jail for one year, but whether our traditions of due process of law and equal protection to all will be vindicated before the world. The words of the appellant, spoken at sentencing, apply (J. A. 211):

To sentence in the United States a European anti-Fascist, who has fought his whole life against German militarism and imperialism, because he asked for three minutes to raise his objections against the abuse of power would unavoidably weaken the confidence of many millions of non-Americans in American justice and the American way of life. Such a sentence could not but lower the prestige of the United States in the eyes of the innumerable progressive-minded and freedom-loving peoples in the world. I ask you, therefore,

to prove, by not sentencing me, that justice can be found in the United States for a European anti-Fascist despite the mad hysteria organized by the Un-American Activities Committee.

So too apply the words of the Supreme Court in *Chambers v. Florida*, 309 U. S. 227, 241: "No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

We ask this Court to extend to this alien Communist the rights under our Constitution and judicial system which have until now been denied him by both the Committee and Court below. We submit that the Court should reverse the judgment below and direct that the indictment be dismissed.

Respectfully submitted,

DAVID REIN,
ABRAHAM J. ISSERMAN,
1105 K Street, N. W.,
Washington 5, D. C.,

CAROL KING,
220 Broadway,
New York 7, New York,

JOSEPH FORER,
1105 K Street, N. W.,
Washington 5, D. C.,
Attorneys for Appellant.

APPENDIX A.

Statutes Involved.

(a) Rev. Stats. § 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, § 192:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

(b) Sec. 21 of Judicial Code, Act of March 3, 1911, c. 231, § 21, 36 Stat. 1090, U. S. C. Title 28, § 25:

Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a

certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

(c) Sec. 121(b), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828, amends Rule XI(1)(q)(2) of the Rules of the House of Representatives to provide:

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

BRIEF ON BEHALF OF APPELLEE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9582

GERHART EISLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

GEORGE MORRIS FAY,
United States Attorney,

WILLIAM HITZ,
Assistant United States Attorney,
Attorneys for Appellee.

*United States Court of Appeals
for the District of Columbia*

FILED JAN 13 1918

Joseph W. Stewart
CLERK

INDEX

	Page
Counterstatement of the case.....	1
Summary of argument.....	7
Argument.....	
I. Court's action in striking affidavit of prejudice was proper (Answering App. 1).....	10
A. Affidavit not sufficient.....	10
B. Affidavit filed too late.....	13
C. Certification should be signed by local counsel of record.....	13-14
D. Question of legality of striking of affidavit is now moot.....	14
II. Appellant received a fair trial and the court did not exhibit hostility and bias (Answering App. 2).....	15
A. No abuse of discretion in keeping examination of witnesses and objections of counsel in proper bounds.....	15
B. Court did not harass appellant's counsel or reprimand him without cause.....	15
C. Court did not unduly intervene in examination and cross-examination of witnesses.....	16
D. Court did not make inconsistent rulings on evidence prejudicial to appellant (Answering App. 3).....	16
E. Not error for court to receive from counsel table objection of appellant to supplemental charge, under the circumstances (Answering App. 4).....	19
F. The court showed no bias at the hearing of the motion for new trial.....	20
III. Exclusion of proffered evidence that Committee was acting improperly is not error (Answering App. 5).....	20
IV. There was no exclusion by the court of matters of proper defense..	21
A. In his charge court did not misstate defense evidence (Answering App. 6).....	21
B. (1) Proffered evidence that appellant attempted to make legal objection to being sworn not excluded (Answering App. 7).....	22
(2) Court properly refused prayers that jury acquit if it found appellant had merely attempted to make legal objection to being sworn to testify (Answering App. 8).....	22
C. Legality of appellant's custody at hearing irrelevant (Answering App. 9).....	22
D. Good faith no defense to willful default (Answering App. 10, 11 and 12).....	22-23
E. Exclusion of evidence that appellant was an alien in transit detained against his will was not error (Answering App. 13).....	23

V. Violation of the statute was alleged and proved.....	Page 23
A. Motion for acquittal on insufficiency of evidence properly denied (Answering App. 14).....	23
B. Mere appearance is not compliance with the statute (Ans. App. 15).....	28
VI. The Committee is constitutional (Answering App. 16)	28
Conclusion.....	28

TABLE OF CASES

<i>Barsky v. Holtzoff</i> , U. S. Court of Appeals for D. of C., No. 126 (misc.), Decided June 11, 1947, rehearing denied June 12, 1947.....	11, 13
<i>Carlisle v. United States</i> , 83 U. S. 147.....	23
<i>Fields v. United States</i> , U. S. Court of Appeals for D. of C., No. 9486, Decided October 27, 1947, cert. denied Jan. 12, 1948, (No. 458).....	17, 19, 22, 23
<i>Griffin v. United States</i> , U. S. Court of Appeals for D. of C., No. 9642, Decided December 8, 1947.....	16
<i>Hurd v. Letts</i> , 80 App. D. C. 233.....	10
<i>Josephson v. United States</i> , U. S. Circuit Court of App. (2d Circuit), No. 20790, decided December 9, 1947.....	10, 21, 24, 28
<i>Rudd v. United States</i> , 173 F. 912.....	16
<i>Sinclair v. United States</i> , 279 U. S. 263.....	24
<i>Townsend v. United States</i> , 68 App. D. C. 223.....	28
Statutes:	
2 U. S. C. 192.....	1, 28
28 U. S. C. 25.....	14
Legislative Reorganization Act of 1946, Public Law 601, 79th Congress.....	1
Miscellaneous citations:	
Institutes on International, Law by Wildman.....	23
Convention between the United States of America and Other Powers (Geneva Convention).....	25
Article 5.....	25

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9582

GERHART EISLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA*

BRIEF ON BEHALF OF APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 27, 1947, an indictment was returned by the Grand Jury for the District of Columbia charging appellant with a violation of 2 U. S. C. 192 (J. A. 230).

The indictment, after citing the authority for the creation of the Committee, charged:

Gerhart Eisler, having been summoned as a witness by the authority of the House of Representatives, through its Committee on Un-American Activities, to give testimony before the said Committee at its session within the District of Columbia on February 6, 1947, upon matters of inquiry committed to said Committee by Public Law No. 601, Section 121, and aforesaid Resolution 5, did appear before the said Committee, on February 6, 1947, and was directed to be sworn to testify upon said matters, and the said Gerhart Eisler thereupon failed and refused so to be sworn to testify, and thereby

on February 6, 1947, within the District of Columbia, willfully did make default (J. A. 215).

Immediately preceding the arraignment of appellant, on April 22, 1947, David A. Rein, Esquire, a member of the bar of this United States District Court, entered his appearance, and Mrs. Carol King, an attorney of New York City, was admitted to the bar of the court *pro hac vici* by Chief Justice Laws and entered her appearance (J. A. 229-230). Thereupon appellant was arraigned before Chief Justice Laws and entered a plea of not guilty (J. A. 230).

At some time, the exact date of which is not clear from the record, the date of trial was set for May 26, 1947 (J. A. 4). At some time between arraignment on April 22 and the date of about May 20, 1947, notice was given to counsel for appellant that the trial of the case would be before Justice Holtzoff. It is conceded by appellant that on about May 20 he was so advised (J. A. 225). It is not on the record how long before that date this information had come to the attention of his counsel.

Numerous preliminary motions were filed by counsel for appellant, which were set for hearing on May 23, before Justice Holtzoff. Several days before this, Mr. Rein came to the chambers of Justice Holtzoff, accompanied by Assistant United States Attorney Hitz, and requested a continuance of the motion and of the trial. The continuance of the motion was denied but the continuance of the trial was granted to May 27 (J. A. 4).

On May 23 the motions were argued before Justice Holtzoff and decided. That same afternoon Mr. Rein, accompanied by Mr. Isserman whose appearance had been entered *pro hac vici*, applied to Justice Holtzoff in chambers for a continuance of the trial, because Mr. Isserman had just received word that his brother had died. The court granted a continuance of the trial until June 4 (J. A. 4). On May 29 appellant filed an affidavit of bias and prejudice against Justice Holtzoff (J. A. 231, J. A. 222) which was accompanied by the certification of good faith of Mrs. Carol King.

On June 4, 1947, at the commencement of the trial, Justice Holtzoff, by a written memorandum, struck the affidavit of prejudice (J. A. 3, 231).

The trial commenced on June 4 and the following evidence was presented to the jury:

The Un-American Activities Committee was functioning pursuant to the resolution¹ of the House of Representatives and under the chairmanship of Representative J. Parnell Thomas, in January and February 1947 (J. A. 13).

So functioning, the Committee, on January 23, 1947, issued a subpoena (J. A. 13) for appellant to appear on February 6 before the Committee and "there to testify touching matters of inquiry committed to said Committee" (J. A. 23). This subpoena was served upon appellant at his residence in New York City on January 24, 1947 (J. A. 22, 23).

On February 4, 1947, appellant was taken into custody by two security officers of the Immigration and Naturalization Service of the Department of Justice (J. A. 78, 82).

Still in that custody appellant was brought to Washington, D. C., and, on February 6, 1947, to the hearing room of the Committee (J. A. 13, 85).

At the hearing appellant had counsel, Mrs. Carol King (J. A. 14), who was present in the room (J. A. 14, 19).

The Committee was presided over on that day by Chairman Thomas (J. A. 13). A quorum was present (J. A. 16) and the Committee was functioning pursuant to the House resolution (J. A. 13). The Committee was empowered to administer oaths to witnesses (J. A. 13), and all witnesses were sworn as the "first step" in giving their testimony (J. A. 14).

Chairman Thomas and Mr. Robert E. Stripling, chief investigator for the Committee who was present and conducted the interrogation of appellant at the hearing, testified at the trial as to what took place at the Committee hearing in question. That Committee proceeding is most completely and accurately (J. A. 48) set forth in the official published transcript from which Chairman Thomas, on cross-examination by coun-

¹ House Resolution No. 5, Jan. 3, 1947, adopting for the 80th Congress the applicable portions of the legislative Reorganization Act of 1946, Public Law 601, 79th Congress. That act established the Committee on Un-American Activities in the House of Representatives and defined its powers. This resolution was received in evidence as Government exhibit 2.

sel for appellant, read all that bore upon appellant's refusal to be sworn and to testify (J. A. 48), as follows:

The CHAIRMAN. Now, Mr. Stripling, call your first witness.

Mr. STRIPLING. Mr. Gerhart Eisler, take the stand.

Mr. EISLER. I am not going to take the stand.

Mr. STRIPLING. Do you have counsel with you?

Mr. EISLER. Yes.

Mr. STRIPLING. I suggest that the witness be permitted counsel.

The CHAIRMAN. Mr. Eisler, will you raise your right hand?

Mr. EISLER. No. Before I take the oath——

Mr. STRIPLING. Mr. Chairman——

Mr. EISLER. I have the floor now.

Mr. STRIPLING. I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.

The CHAIRMAN. Sit down, Mr. Eisler. Now, Mr. Eisler, you will be sworn in. Raise your right hand.

Mr. EISLER. No.

The CHAIRMAN. Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.

Mr. EISLER. I am not treated as a guest.

The CHAIRMAN. This Committee——

Mr. EISLER. I am a political prisoner in the United States.

The CHAIRMAN. Just a minute. Will you please be sworn in?

Mr. EISLER. You will not swear me in before you hear a few remarks.

The CHAIRMAN. No; there will be no remarks.

Mr. EISLER. Then there will be no hearing with me.

The CHAIRMAN. You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. EISLER. I am ready to answer all questions, to tell my side.

The CHAIRMAN. That is not the question. Do you refuse to be sworn in? All right.

Mr. EISLER. I am ready to answer all questions.

The CHAIRMAN. Mr. Stripling, call the next witness. The Committee will come to order, please. What is the pleasure of the committee?

Mr. STRIPLING. Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.

Mr. MUNDT. Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

Mr. RANKIN. Not "sworn in," but to be sworn.

The CHAIRMAN. Mr. Eisler, do you refuse, again, to be sworn?

Mr. EISLER. I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The CHAIRMAN. I said that I would permit you to make your statement when the Committee was through asking questions. After the Committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the Committee. But first you have to be sworn.

Mr. EISLER. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The CHAIRMAN. Then you refuse to be sworn.

Mr. EISLER. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

Mr. CHAIRMAN. We will give you those 3 minutes when you are sworn.

Mr. EISLER. I want to speak before I am sworn (J. A. 43-47).

Appellant testified in his own behalf at the trial, contending that he did not refuse to be sworn to testify but rather that he sought first to make a three minute statement (J. A. 113 *et seq*).

After testifying at the trial that he had been interrupted before the Committee and that he had not been able to make his

complete statement to the Committee before being told that he would have to be sworn, the following transpired:

By Mr. ISSERMAN:

Q. The statement you made before you were to take the oath was not a complete statement?

A. No.

Q. And Mr. Stripling prevented you from making a complete statement?

A. Yes.

Q. What did you want to say?

A. Before I took the oath I wanted to make a few *remarks in connection with my arrest* (J. A. 130).
[Italics added.]

After testifying that he had "made repeated efforts to be sworn in" at the Committee hearing (J. A. 131), appellant was questioned by the Court.

Q. When you say you made repeated efforts to be sworn you mean you made offers to be sworn on condition——

A. (Interposing.) Yes.

Q. (Continuing). That first you be given an opportunity to speak?

A. Correct.

Q. You did not make an unconditional offer to be sworn, did you?

A. It was conditioned if I would be allowed three minutes to speak I would unconditionally take the oath (J. A. 131).

Appellant testified on direct examination that he had with him at the Committee hearing a long mimeographed statement which he had written on February 2, and that he intended using that statement at the hearing (J. A. 139). On cross-examination appellant was asked if it were not true that certain matters contained in that statement he proposed to read to the Committee indicated that he was imposing conditions upon his answering of the Committee's questions even before he had taken the oath. To this appellant replied "No, by no means. That was a proposal. If the Committee would have convinced

me certain questions were relevant I would have answered those questions" (J. A. 143).

The following then took place at the trial:

By Mr. Hirtz:

Q. You would not have given them the name of any of your friends, would you, Mr. Eisler?

A. I would have given them only such friends which I was sure they could not slander and defame.

Q. You would have judged that, would you not?

A. I guess I would (J. A. 143, 144).

Appellant was questioned further at the time about the mimeographed statement which he had prepared in advance to be read at the hearing and he admitted that that proposed statement contained the following sentence: "In order to save you time when it comes to questioning I shall tell you what I am going not to answer" (J. A. 148).

On June 10, 1947, appellant was found guilty by the jury and was permitted by the court to remain on the same bond pending sentence (J. A. 231).

On June 27, 1947, appellant's various motions after verdict were argued and denied (J. A. 232).

On June 27, 1947, Appellant was sentenced to imprisonment for one year and to a fine of \$1,000, being permitted by the court to remain on the same bond pending appeal (J. A. 3, 232).

SUMMARY OF ARGUMENT ²

I

Court's action in striking affidavit of prejudice was proper (answering Appellant's Point 1)

A. The affidavit was not sufficient on its face because it did not state facts showing "a personal bias or prejudice either against" appellant "or in favor of" the Government.³

B. The affidavit was filed too late. It was filed on May 29, 1947, which was *three days after* the original trial date of May 26.

² The argument in this brief follows the arrangement in appellant's brief both in form and points discussed.

³ Sec. 28 U. S. C. 25.

C. The court stated that the certification of good faith required by the statute to accompany the affidavit of prejudice should be signed by the counsel of record who is a member of the local bar, rather than merely by the out-of-town counsel admitted *pro hac vici*. The court's stated reason for this view was that, where a defendant is represented by local counsel as well as by counsel *pro hac vici*, the local counsel bears the greater responsibility to this court and should be the counsel to carry or at least to share the responsibility of scrutinizing and attesting to the good faith of a litigant who sees fit to make the serious assertion that the court has a personal bias or prejudice against him.

D. The question as to whether or not the affidavit of prejudice was properly stricken by the court is moot at this time, after trial has been had before the court sought to be disqualified.

II

Appellant received a fair trial and the Court did not exhibit personal hostility and bias (answering Appellant's Point 2)

A. The court did not abuse his discretion in keeping examination of witnesses and objections of counsel within proper bounds.

B. The court did not harass appellant's counsel or reprimand him without cause.

C. The court did not unduly intervene in the examination and cross-examination of witnesses.

D. The court did not make inconsistent rulings on evidence prejudicial to appellant (answering Appellant's Point 3).

E. It was not in error for the court to receive from the counsel table the objection of appellant to supplemental charge, under the circumstances (answering Appellant's Point 4).

F. The court showed no bias at hearing of motion for new trial.

III

Exclusion of proffered evidence that committee was acting improperly was not error (answering Appellant's Point 5)

The court properly refused to admit evidence that the Committee was acting improperly because such evidence was irrele-

vant and immaterial, and, under facts in the case, the point is not available to appellant.

IV

There was no exclusion by the court of matters of proper defense

A. In his charge the court stated in its most favorable aspect appellant's position as to his refusal to be sworn to testify (answering Appellant's Point 6).

B. (1) Proffered evidence that appellant merely attempted to make legal objection to being sworn was not excluded by the court (answering Appellant's Point 7).

(2) Court properly refused prayers that jury acquit if it found that appellant had merely attempted to make legal objection to being sworn to testify (answering Appellant's Point 8).

C. Exclusion of evidence as to the legality of appellant's custody at the Committee hearing was not error (answering Appellant's Point 9). Such evidence was irrelevant.

D. Exclusion of evidence and refusal to charge to the effect that good faith is a defense to a willful default was not error (answering Appellant's Points 10, 11 and 12). Such evidence was irrelevant.

E. Exclusion of evidence that appellant was an alien in transit detained against his will was not error (answering Appellant's Point 13). Such evidence was irrelevant.

V

A violation of the Statute was alleged and proved

A. Motion for judgment of acquittal based on insufficiency of evidence to go to the jury was properly denied (answering Appellant's Point 14).

(1) One who refuses to give any testimony cannot claim that he was not summoned to give pertinent testimony.

(2) The evidence of appellant's deliberate and intentional refusal, as distinguished from an inadvertent and accidental refusal, was without contradiction even by appellant himself.

(3) Appellant did not have the status of a prisoner of war and, therefore, could not refuse to give any information other than name, rank, or regimental number.

B. Motion to dismiss indictment on ground refusal to be sworn not a "default" was properly denied (answering Appellant's Point 15).

Mere appearance followed by a refusal to be sworn to testify than name and rank, or regimental number.

VI

The committee is constitutional (answering Appellant's Point 16)

Josephson v. United States, U. S. Circuit Court of Appeals (2nd Circuit), No. 20790, decided Dec. 9, 1947.

ARGUMENT

I

Court's action in striking affidavit of prejudice was proper (answering Appellant's Point 1)

A. The affidavit was not sufficient. Appellant in his brief (p. 10) summarizes the affidavit of prejudice as consisting of two parts "(1) As legal advisor to the F. B. I., Justice Holtzoff participated in investigations of aliens and Communists, including a specific F. B. I. investigation of appellant (an alien and a Communist) which resulted in a report that he is a foreign agent"; and "(2) Justice Holtzoff has a personal hatred of Communism as shown by his sponsorship of a bill for the deportation of alien Communists and their incarceration in concentration camps and by his admiration for, and close friendship with, J. Edgar Hoover."

With regard to (1) the court stated at the conclusion of his memorandum striking the affidavit of prejudice "* * * I have no recollection of ever hearing of the defendant in this case until I saw his name in the newspapers several months ago" (J. A. 6). Under the decision of this court in *Hurd v. Letts*, 80 App. D. C. 233, this statement by the trial justice, that he had never heard of the defendant before, disposes of the contention that there was any personal bias or prejudice on

the part of the court directed at the defendant individually as a result of the court's activities in the Department of Justice prior to his appointment to the bench. The remaining part of (1) would appear to suggest that there might be bias or prejudice against the appellant by reason of his being an alien and his membership in the Communist Party, both of which classes of persons it is alleged Justice Holtzoff had engaged in investigating in his alleged capacity as advisor to the F. B. I. With respect to this part of the affidavit, the court, in his memorandum striking it, very aptly said: "Moreover, the allegations relating to Communists are not germane to this case since Communism is not an issue. The indictment involves a charge of willful default in failing to comply with a subpoena issued by a Congressional Committee. In fact, if opposition to Communism were a ground for disqualifying a Judge, I dare say it would be a baffling problem to find a Federal Judge who is qualified to sit" (J. A. 5).

As for part (2), as summarized in appellant's brief, even the affidavit of prejudice does not charge that Justice Holtzoff had a "personal hatred of Communism." The remaining part of (2), as summarized, charges Justice Holtzoff with "admiration for and close friendship with J. Edgar Hoover." In passing on this part of the affidavit the court said in its memorandum: "It might be said in passing that if friendship with the head of a law enforcement agency is a ground for disqualifying a judge then any judge of this court who happens to be a friend of the Superintendent of Police could never sit in a criminal case. Such conclusion would be manifestly absurd" (J. A. 5).

The court, in an opinion filed denying motions for a new trial and in arrest of judgment, based in part upon the court's striking of the affidavit of prejudice at the commencement of the case, made further reference to that affidavit. Between the time of the striking of the affidavit on June 4 and the action of the court in denying the motions after verdict on June 27, the United States Court of Appeals for the District of Columbia had rendered its decision in *Barsky v. Holtzoff*, on June 11, 1947 (Misc. 126).

Justice Holtzoff in his opinion denying the motions after verdict quoted the statement he had made in his memorandum

striking the affidavit, "I have no recollection of hearing of the defendant in this case until I saw his name in the newspapers several months ago." He then said, "The assertion contained in the affidavit that while I was connected with the Department of Justice as Special Assistant to the Attorney General, I was assigned to the Federal Bureau of Investigation, is untrue. Likewise, it is untrue that my duties were concerned with investigations by the Federal Bureau of Investigation into the activities of aliens and Communists. It is untrue that I advised the Director of the Federal Bureau of Investigation as to steps or actions to be taken against alien Communists. It is likewise untrue that I participated in advising, deciding, or determining the policy, nature, scope or objectives of the investigation directed against aliens and Communists. As Special Assistant to the Attorney General of the United States my duties were numerous. On occasion I was requested to give informal opinions to the Federal Bureau of Investigation on questions of law. This aspect of my work, however, consumed but a very small part of my time and was sporadic. I did not participate in determining the policy or scope of investigations. Such matters were handled by other officers of the Department of Justice" (J. A. 208).

Whereas the statement by Justice Holtzoff in his memorandum striking the affidavit, that he had only recently heard of appellant and then only by seeing his name in the newspapers, sufficiently contraverted the allegations of the affidavit so that it was properly stricken, the above-quoted portion of the opinion denying the motions after verdict denies specifically the individual allegations of the affidavit. These statements of fact by Justice Holtzoff are the most certain and definite means of finally determining what actually had been his duties in the Department of Justice and his connection, if any, with the F. B. I. and its numerous activities. It is manifest that Justice Holtzoff was not properly chargeable with personal bias or prejudice against appellant by reason of his previous employment in the Department of Justice, or for any other reason. This fact was as true on June 4, when the affidavit was stricken and trial was commenced, as it was on June 27 when his opinion overruling the motions after trial was filed. The more detailed

denial of the allegations of the affidavit contained in Justice Holtzoff's opinion of June 27 is, of course, now before this court under the doctrine of the *Barsky* case, *supra*, in which it was held that where the action of a trial judge in striking an affidavit of prejudice is before the Circuit Court of Appeals, the trial judge may be heard to deny the allegations of the affidavit. This he has done generally and specifically.

B. The affidavit was filed too late. If the usual practice was followed, a notice by card was mailed by the Assignment Commissioner of the United States District Court to counsel of record in this case that the trial was set for May 26. It is not on this record when counsel received notice of this trial date before Justice Holtzoff. We do know, however, that appellant admits having received this information from his counsel "about May 20" (J. A. 225).

Several days before May 23, David Rein, Esquire, attorney of record for the appellant, requested Justice Holtzoff in chambers for a continuance of the argument on preliminary motions and of the trial. (The trial still being set for May 26.) Justice Holtzoff denied the continuance of the motions but continued the trial until May 27.

On May 23 the motions were argued and disposed of before Justice Holtzoff. The same afternoon in chambers, Mr. Rein and Mr. Isserman (chief defense trial attorney) requested a continuance of the trial date because of the death of Mr. Isserman's brother, which had occurred that same day. The trial was continued until June 4. It was not until May 29 that the affidavit of prejudice was filed. As noted above, this was after *two* continuances had been requested by counsel and granted by Justice Holtzoff; it was three days *after* the first trial date had passed; and it was only five legal days before the *third* date set for trial.

Under these circumstances the court properly held, as one of its grounds for striking the affidavit, that it was filed too late, and, it is submitted, was amply warranted in expressing the opinion that it was also not made in good faith but for dilatory purposes.

C. The court was of the view, when he struck the affidavit of prejudice and again in his opinion overruling the motion after

trial on June 27, that the certification of good faith required by the statute ⁴ to accompany the affidavit of prejudice should be signed by the counsel of record who is a member of the local bar, who for that reason bears a greater responsibility for the accuracy and the *bona fides* of the very serious allegations made, rather than merely by the out-of-town counsel admitted *pro hac vici*. This is a very practical interpretation of the statutory requirement that such certification be by "counsel of record." By such an interpretation many of the evils that are attendant upon the filing of affidavits of prejudice may be avoided, or at least minimized to the fullest. It is, of course, desirable to obtain such an end. When applied to a case, as here, where there is local counsel as well as counsel *pro hac vici*, both of record, such an interpretation would impose no burden, or even hardship, whatsoever upon counsel. At the present time there is no rule of court in this jurisdiction requiring this. However, if one were in effect or should be adopted it would seem to be eminently fair, as well as a practical interpretation of the statute, when applied to a case like the present one, having both kinds of counsel.

D. The question as to whether or not the affidavit of prejudice was properly stricken by the court is moot at this time, after trial has been had before the court sought to be disqualified. The question now is, not whether it appeared before commencement of the trial from the affidavit of appellant that the court had personal bias or prejudice against appellant but, whether the record in fact shows personal bias or prejudice against appellant resulting in his not receiving a fair trial.

In other words, the question now is, not whether appellant *might not* get a fair trial, but, whether he *did* get a fair trial.

The record shows that appellant did receive a fair trial and that all of his legal rights were adequately protected.

⁴ 28 U. S. C. 25.

II

Appellant received a fair trial and the Court did not exhibit hostility and bias (answering Appellant's Point 2)

A. The Court did not abuse his discretion in favor of the Government in keeping the examination of witnesses and the objections of counsel within proper bounds. At J. A. 50 (middle) Mr. Isserman not only interrupted and cut off the answer of the witness, but the Court sustained him in the action, although it appears that an explanatory answer was sought to be made by the witness.

B. The court did not harass appellant's counsel or reprimand him without cause.

In appellant's brief (p. 19) he complains of the action of the court and states with reference to the testimony of Mr. Strippling: "There was nothing in the record which indicated that the witness' difficulty on cross-examination rose out of a lapse of memory." But on line 1 on the preceding page (18) of his brief, appellant quotes from the record: "A. [By Mr. STRIPPLING] I don't recall that he did; no." Thus the quoted record in appellant's own brief shows that this complaint is not only wholly unjustified but shows affirmatively the reason for the statement of the court about which complaint is made.

The rebukes by the court of counsel for appellant were richly deserved and judiciously administered after ample warning was given. At J. A. 51 the court gave a stern but temperate and moderate admonition to counsel, at the bench out of the hearing of the jury.

At J. A. 135, Mr. Isserman deserved, but did not receive, an admonition for proceeding in violation of a ruling just made by the court sustaining an objection by the Government. Another example of this is found at J. A. 146. The restraint and lack of prejudice by the court is clearly shown by such references to the record.

C. The court did not unduly intervene in the examination and cross-examination of witnesses.

In *Griffin v. United States*, No. 9542, decided by this court December 8, 1947, the court said on page five, "There can be no question about the rule as to the right and duty of a Federal Court in making proper inquiries of witnesses in any kind of a trial in order that the jury may have a proper understanding of a case."

Appellant's examples from the record quoted in his brief do not show an abuse of this right and duty of the court. On the contrary, a reading of the record clearly shows a proper and conscientious discharge by the court of his judicial obligations in this respect.

This court in the *Griffin* case, *supra*, quoted from the case of *Rudd v. United States*, 173 F. 912, 914: "A judge should not be a mere automatic oracle of the law but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done."

D. The court did not make inconsistent rulings on evidence prejudicial to appellant (answering Appellant's Point 3).

(a) Appellant contends that testimony "that counsel for appellant was present in the Committee hearing room * * * enabled the jury to infer that it was the proper function for counsel, and not the witness, to make a legal objection before the Committee" (App. Br. p. 30).

Testimony that appellant had counsel present before the Committee was given in the following ways: (1) by Chairman Thomas in answer to a direct question of the prosecutor (J. A. 14); (2) by an answer to a question by Mr. Isserman on cross-examination of Chairman Thomas (J. A. 19); and (3) by Mr. Stripling in answer to a direct question of the prosecutor (J. A. 26).

The "inference" about which appellant now complains was brought into the testimony, if at all, by appellant's counsel who elicited these answers from Chairman Thomas on cross-examination: "In the first place, as was stated yesterday, all witnesses are sworn. That is the first step. Naturally if we can't get beyond that, there is no second step" (J. A. 48). "But there was no legal objection in this case. He just would not be

sworn. The question of legality did not enter into it. Even his attorney didn't say a word" (J. A. 49).

As to the practice of the Committee with respect to counsel, it makes no difference whether appellant's counsel understood that only appellant himself could object to the proceedings and to being sworn to testify. Nor does it matter that appellant actually may have been so informed, because his good faith in refusing to be sworn to testify would not be a defense.

That good faith is not a defense to this charge was decided by this court in *Fields v. United States*, No. 9486, decided October 27, 1947, cert. denied Jan. 12, 1948 (No. 458). In so holding, this court not only approved the charge of the trial court (the same trial justice as in the case at bar) but quoted and adopted the very language of the charge (p. 5 of the opinion): "The reason or the purpose of failure to comply or refusal to comply is immaterial, so long as the refusal was deliberate and intentional and was not a mere inadvertence or an accident."

In conformity with the rule of the *Fields* case, the court's charge eliminated any inference as to who could have objected to what, when he charged: "Even if the defendant believed or was advised that he could refuse to be sworn and to testify except on his own terms, this fact is no defense. A mistaken view of the law does not excuse the defendant and is no defense in this case" (J. A. 173).

(b) Appellant next contends that the court excluded evidence, offered by appellant, as to the contents of the three minute statement appellant tried to make to the Committee. This is not accurate. The following took place at the trial:

Q. [By Mr. ISSERMAN.] And what did you want to say?

A. [By EISLER.] Before I took the oath I wanted to make a few remarks in connection with my arrest (J. A. 130).

And, in more detail, at J. A. 133:

Q. [By Mr. ISSERMAN.] Mr. Eisler, why did you ask the Committee for three minutes to make some remarks before you would be sworn on the morning of February 6, 1947?

A. [By Mr. EISLER.] Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person (J. A. 133).

It was *after* this testimony that appellant was not permitted to go into further detail as to what he intended to say to the Committee (J. A. 133, bottom, 134, 135).

The argument to the jury by the prosecutor, complained of here, on the matter of the statement, dealt with this testimony by appellant on direct examination at the trial and with the evidence about the "statement," "remarks," etc., at the Committee hearing, brought out in their fullest detail by counsel for appellant on cross-examination of Chairman Thomas (J. A. 43-47).

(c) Appellant next complains because the court refused to permit this question to be pursued by counsel: "Q. Now, when you were served with a subpoena on Jan. 24, 1947, did you have any intention as to your appearance before that Committee?" (J. A. 121). The hearing was to be held on February 6, 1947. The court, however, permitted testimony as to preparations made by appellant to come to Washington, preparation of a 20-page mimeographed statement, conference with counsel, railroad tickets and hotel reservations (J. A. 122).

Appellant complains because the court sustained an objection to this question by Mr. Isserman: "A. Mr. Eisler, had you been allowed to make your statement of three minutes would you have answered all questions put to you by the Committee?" (J. A. 135). However, immediately thereafter the court permitted an affirmative answer to this question to stand: "Q. Mr. Eisler, at the time you were in the hearing room did you make any statement to the Committee which indicated that if you were allowed the three minutes to make your objections that you would have answered the questions and been sworn?"

In answer to a question by his counsel as to whether at any time he had refused to be sworn at the trial, appellant said "A. No; I made repeated efforts to be sworn in" (J. A. 131). This answer by appellant, unexplained and not further examined, would indicate that his failure to be sworn was not only unintended but affirmatively against his will. In view of this

and other testimony it was proper cross-examination of appellant to bring out that at the time of the alleged refusal he had in his possession a mimeographed twenty page one-hour statement which he had prepared on February 2 (J. A. 131, 139), mentioning in detail the questions which he would refuse to answer were he asked them (J. A. 141). For example, he admitted that he said in the statement that, if asked, he would not give the names of his friends unless he was sure "they could not slander and defame them" (J. A. 144). This clearly showed that appellant intended to impose his own extra-legal conditions upon his giving of testimony. It was evidence of the most direct and conclusive nature on the question of his intent and, of course, it bore as well upon the credibility of his testimony on direct examination.

With regard to this cross-examination, appellant complains that the court would not permit him "to clarify" the situation by showing "that the appellant would, as was his right, have answered pertinent questions while declining to answer questions beyond the Committee's authority" (App.'s Br., p. 30). Appellant refers to J. A. 146, 147 for this alleged exclusion of evidence. But no such evidence was offered. The evidence offered (by questions) and excluded was as to appellant's knowledge of his rights and what his counsel may have advised him. This evidence of knowledge of the law and advice of counsel was properly excluded as irrelevant because good faith is no defense. *Fields v. United States, supra*.

E. It was not error for the court to receive from the counsel table the objection of appellant to supplemental charge, under the circumstances (answering Appellant's Point 4).

The supplemental charge (J. A. 177) was in two parts. The first was a portion of the transcript of the record previously designated by Mr. Isserman at the bench and requested by him to be read to the jury (J. A. 176). The second part had previously been given (J. A. 173) in the main charge and was to the effect that a witness may not impose conditions upon his giving of testimony. This had already been objected to by appellant at the bench at the conclusion of the main charge (J. A. 175). (No point is made by appellant that his rights are not protected to question on appeal the substance of this

second part). Appellant does not object, of course, to the first part because the court merely read from the transcript as was requested by him.

When appellant asked the court for permission to approach the bench after the supplemental charge had been completed, the court said: "You except to that; it may be noted." To which Mr. Isserman replied: "I am excepting to that latter portion" (J. A. 177). This was in the hearing of the jury.

The complaint of appellant is that the action of the court made it impossible "to withhold from the jury knowledge of what portions of the charge counsel considers detrimental to his case" (App.'s Br., p. 31). But the statement of the court indicated, if anything, to the jury that the *whole* supplemental charge was being excepted to by appellant. Containing what he thought was a helpful part and a detrimental part, appellant could, therefore, not be harmed by this in the eyes of the jury. It was appellant himself who stated that he was excepting to the "latter portion." Thus, perhaps, appellant's complaint should be directed against himself and not the court.

The further contention of counsel for appellant, that in this incident may be found evidence of bias on the part of the court, brings to the mind of the writer of this brief the old maid who was always looking anxiously under the bed.

F. The court showed no bias at the hearing of the motion for a new trial. A reading of the entire proceedings on the motion (J. A. 226) is the best answer to the excerpts taken out of context by appellant in his brief. Even the record indicates, as did to a greater degree the attitude of counsel not shown by the printed word, that counsel was attempting to lecture the court on the proper conduct of a trial, charging the court with numerous violations of the Canons of Judicial Ethics.

III

Exclusion of proffered evidence that committee was acting improperly was not error (answering Appellant's Point 5)

Had appellant taken the oath and offered to give testimony, in orderly fashion in conformity with the rules and practices of Congressional Committee hearings, he could raise the ques-

tion as to whether the Committee, by any particular question directed to him was then in fact actually exceeding proper constitutional limits. But under the facts here presented, the Committee was in session and was seeking to proceed and had not even commenced a line of inquiry, because appellant never was willing to be sworn and become a witness.

Thus appellant's contention on this record must necessarily be that the Committee *would not* ask him a single question within the proper scope of its authority. But it is not for him to decide what the Committee *would* ask him if he *should* permit them to ask him any questions at all. By refusing to become a witness he is forced now to take the position that *no question* which *could be* asked by that Committee would be constitutional. This contention was made, and decided adversely to the appellant on identical facts in *Josephson v. United States*, No. 20790, decided by U. S. Circuit Court of Appeals (2d Circuit) on December 9, 1947.

IV

There was no exclusion by the Court of matters of proper defense

A. The court stated in its most favorable aspect appellant's position as to his refusal to be sworn to testify (answering Appellant's Point 6).

The original charge of the court (J. A. 173) seemed accurately to state the defense position.

Upon objection to this part of the charge at the bench, there was a discussion as to the testimony of appellant before the jury and the court stated that he would, and he did, read to the jury a particular answer of appellant on this point. It was the passage referred to and located by Mr. Isserman in the record (J. A. 176). This was the supplemental charge previously discussed in this brief.

By the reading of this one answer to the jury in the supplemental charge the court actually gave appellant more than he was entitled to, because it emphasized this bit of testimony over the other less favorable answers given by him on the subject. At one point on direct examination he said he would not take the stand "Before I make a few *remarks*." [Italics sup-

plied.] (J. A. 129.) Later at J. A. 130 he said he "wanted to make a few remarks *in connection with my arrest.*" [Italics supplied.] At J. A. 131, it was "three minutes *to speak.*" [Italics supplied.] At J. A. 132, it was "'Give me a chance *to speak* for three minutes * * *.'" [Italics supplied.] At J. A. 136, it was "*a few remarks*" and "*my statement.*" [Italics supplied.]

B. (1) Proffered evidence that appellant merely attempted to make legal objection to being sworn was not excluded by the court (answering Appellant's Point 7).

Appellant now contends in his brief that "various items of evidence offered for this purpose were excluded by the trial court, including evidence of the contents of the intended three-minute statement" (App. Br. p. 39). Evidence of the substance of the contents of the intended "three-minute remarks" was not excluded. It was given by appellant to the jury as being "a few remarks in connection with my arrest" (J. A. 130). At J. A. 133, appellant said he wanted to make some remarks before being sworn "because I had objection against the whole, what I considered unlawful proceedings of the Committee against my person."

(2) Court properly refused prayers that jury acquit if it found that appellant had merely attempted to make legal objection to being sworn to testify (answering Appellant's Point 8).

A prospective witness cannot impose his own conditions on his giving of testimony. If he attempts to do so and those conditions are unacceptable to the Committee in the procedure it has reasonably adopted, the conditional refusal is a default. It is irrelevant that this decision of the prospective witness be made and be pursued upon the advice of counsel. The only question is whether the failure was deliberate and intentional. The reason for it is irrelevant. *Fields v. United States, supra.*

C. Exclusion of evidence as to the legality of appellant's custody at the Committee hearing was not error (answering Appellant's Point 9). Such evidence was irrelevant.

D. Exclusion of evidence and refusal to charge to the effect that good faith is a defense to a willful default was not error

(answering Appellant's Point 10, 11 and 12). Such evidence was irrelevant.

Good faith is not a defense to a willful default. It need only be shown to be deliberate and intentional and not a mere inadvertence or an accident. *Fields v. United States, supra*.

E. Exclusion of evidence that appellant was an alien in transit detained against his will was not error (answering Appellant's Point 13). It is contended that such a person cannot be required to give testimony to Congress because his "primary allegiance" is to his own country. If this question is determined by whether or not a transient alien owes "allegiance" to his country, it is disposed of by the following statement in *Carlisle v. United States*, 83 U. S. 147, 154:

"The rights of sovereignty" says Wildman, in his *Institutes on International Law*, "extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection."

Furthermore it should be unnecessary to point out that aliens, themselves, are the proper subject of Federal legislation in many fields—requisites of citizenship, Federal employment, bankruptcy, fisheries, transit permits and others too numerous to mention. To say that a transient alien may not be required to assist in the formulation of legislation by complying with a Congressional subpoena is unrealistic to the point of being absurd.

V

A violation of the statute was alleged and proved

A. Motion for judgment of acquittal, based on insufficiency of evidence to go to the jury, was properly denied (answering Appellant's Point 14).

(1) When the subpoena was issued on January 23, 1947, and when appellant appeared before the Committee on February 6, 1947, the Committee was functioning pursuant to the House Resolution creating it (J. A. 13). One who refuses to be sworn to testify cannot claim that he was not summoned to testify on matters of inquiry committed to the Committee. In *Josephson v. United States*, *supra*, p. 349 the Court said:

The prosecution met, then, the requirement of *Sinclair v. United States*, *supra* at 296-97, that it "plead and show that the question pertained to some matter under investigation" by pleading and showing that the appellant refused to answer any and all pertinent questions.

It should be pointed out in connection with this point raised by appellant that, even if appellant had become a witness, the question of the pertinency of the questions asked would not be for the jury, but a question of law for the court (*Sinclair v. United States*, 279 U. S. 263) and, therefore, not subject to attack for insufficiency of evidence to go to the jury.

(2) The evidence of appellant's deliberate and intentional refusal, as distinguished from an inadvertent and accidental refusal, was without contradiction even by appellant himself. The testimony of appellant is best summarized by the following question and answer:

Q. You did not make any unconditional offer to be sworn, did you?

A. It was conditioned if I would be allowed three minutes to speak I would unconditionally take the oath (J. A. 131).

Thus, appellant admittedly imposed his own condition upon his taking the oath and testifying. The condition was not acceptable to the Committee and he was so informed (J. A. 47). Therefore, his refusal was "willful" as defined in the *Fields* case.

(3) Appellant contends that as an interned enemy alien ⁵ at

⁵ For purposes of the discussion of this point raised by appellant, this argument will proceed as if conceding that appellant at the time of the Committee hearing was an interned civilian enemy alien. However, such was not the fact as he never has been interned (J. A. 81).

the time of the alleged default he was entitled to the same rights as a prisoner of war, and, as such, could not be required to testify before the Committee, and for this reason cannot be prosecuted for his refusal to do so. Appellant relies upon Article 5 of the "Convention between the United States of America and Other Powers", signed at Geneva, July 27, 1929, commonly referred to as the Geneva Convention.

But appellant did not have the status of a prisoner of war and, therefore, could not refuse to give any information other than name and rank, or regimental number.

The asserted consequences of appellant's alleged status as an interned enemy alien are for the consideration of the court as a question of law and are not considerations of fact for the jury and, therefore, cannot be raised by questioning the sufficiency of the evidence to go to the jury. Nevertheless the point here raised by appellant will be answered.

Article 5 of the Geneva Convention provides:

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, or else his regimental number.

If he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

No coercion may be used on prisoners to secure information relative to the condition of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever.

If, because of his physical or mental condition, a prisoner is unable to identify himself, he shall be turned over to the medical corps.

The agreement between the United States and Germany to extend the provisions of the Geneva Convention with respect to prisoners of war to civilian enemy aliens is contained in the exchange of two telegrams between the governments of the United States and Germany, transmitted through the Swiss Government. On December 18, 1941, the Secretary of State transmitted to the German government the proposal "to apply the provisions of the Geneva Prisoner of War Convention to any civilian enemy aliens that may be interned, *insofar as the*

provisions of that Convention may be adaptable thereto." [Italics supplied.] There was received by the American Legation in Switzerland, on July 3, 1942, a communication from the German government agreeing for its part to act according to the proposal of this government.

To the contention of appellant, appellee replies (A) that Article 5 does not give even a prisoner of war immunity from prosecution for refusal to give testimony before the Committee; (B) that Article 5 has not been made applicable to interned civilian enemy aliens; and (C) that whatever be the answer to (A) and (B), a mere Executive agreement with a foreign power cannot have the effect of giving appellant immunity from a criminal statute.

(A) Assuming for purposes of argument only (for the appellee contends otherwise) that Article 5 has by international agreement been made applicable to interned civilian enemy aliens, the special protection given him by that article is that no coercion may be used on him "to secure information relative to the condition of his army or his country." Should he refuse to answer he may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment. No protection is given him from coercion in securing information on subjects which do not relate to the condition of his army or his country.⁶ Were it the intent and purpose of the article to afford the prisoner protection from coercion in the securing of *any* information on *any* subject (other than his identity) then the limiting words "relative to the condition of their army or country" would not have been used. These words were used for a purpose and they must be given their proper meaning. Their function can be no other than to limit the special protection granted. Where such a special and limited protection is granted, the established rules of statutory construction forbid its extension into matters upon which the article is silent. This is especially true when such an extension of the protection (actually an "immunity" from testifying and giving information) would be in derogation of the legislative function of

⁶ It is not the fact, nor was it claimed by the appellant before the Committee, that the Committee's purpose was to question him concerning the condition of his army or his country.

Congress and in contravention of a criminal statute punishing contumacy. To extend the protection expressly granted, by disregarding words of limitation in Article 5 or by adding to the article words it does not contain, would be legislating on the subject rather than construing the provisions of the article.

(B) This government has never considered Article 5 as "adaptable" to civilian enemy aliens. On January 25, 1946, the Secretary of State set up the "Interdepartmental Prisoner of War Committee," consisting of the State, War, Navy, and Justice Departments, among other agencies, to study, in the light of actual practice in World War II, existing conventions applicable to prisoners of war and civilian internees and to make recommendations with respect to necessary revisions. This Committee drew up a report and made recommendations for the use of the United States delegation to the meeting, convened at Geneva on April 14, 1947, of the "International Committee of the Red Cross," which was to consider prisoner of war and civilian internee conventions. It was the opinion of the Interdepartmental Committee, which became the recommendation of the United States delegation, that Article 5 did not apply to civilian enemy aliens.

A mere reading of Article 5 shows that this convention, in every sentence of which the word "prisoner" appears, was, and can be only, for the sole protection of captured military personnel. The situations contemplated, the information legitimately to be sought as to identity, the information as to army and country which may not be secured by coercion, and the provision as to a prisoner unable to identify himself, clearly show that the article is not adaptable to an interned civilian enemy alien. The opinion of the Interdepartmental Committee seems clearly correct.

(C) If it be assumed for purposes of argument that Article 5 (part of a ratified treaty) gives a prisoner of war immunity from prosecution for refusing to give testimony before the Committee, no such claim can be made by an interned civilian enemy alien unless he has been given the status of a prisoner, which status, if at all, is conferred upon him by the agreement referred to above between this government and the government of Germany. That agreement is an Executive act only, and

cannot have the force and effect of a statute. Where it conflicts with a statute, the statute will prevail. Likewise, it cannot except from the operation of a statute a group of persons otherwise bound by its provisions and subject to its penalties.

B. Motion to dismiss indictment on ground refusal to be sworn not a "default" was properly denied (answering Appellant's Point 15).

Mere appearance followed by a refusal to be sworn to testify is not compliance with the statute.

Appellant's refusal to be sworn to testify constituted a default under United States Code, Title 2, Section 192. It is not sufficient to avoid committing a default that a person summoned as a witness merely make physical appearance before the Committee. Although a slightly different type of default was before the court in the *Townsend* case, the court had this to say in disposing of that case: "If appellant's contention were correct, a witness might walk into a hearing room of the Committee; announce his identity to the Chairman of the Committee; inform them that he had no intention of staying; depart, and yet be absolved of a willful default. Such a construction of the state would be absurd." *Townsend v. United States*, 68 App. D. C. 223, 228.

VI

The Committee is constitutional (answering Appellant's Point 16)

Josephson v. United States, supra.

CONCLUSION

The judgment should be sustained.

Respectfully submitted.

GEORGE MORRIS FAY,
United States Attorney,

WILLIAM HITZ,
Assistant United States Attorney,
Attorneys for Appellee.

REPLY BRIEF FOR APPELLANT

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9582

GERHART EISLER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

*United States Court of Appeals
for the District of Columbia*

FILED FEB 6 1948

Joseph W. Stewart
CLERK

DAVID REIN,
ABRAHAM J. ISSERMAN,
1105 K Street, N. W.,
Washington 5, D. C.,

CAROL KING,
220 Broadway,
New York 7, New York,

JOSEPH FORER,
1105 K Street, N. W.,
Washington 5, D. C.,
Attorneys for Appellant.

INDEX

	Page
I. The Affidavit of Prejudice	1
A. The affidavit was substantively sufficient.....	1
B. The affidavit was timely	3
C. The affidavit was sufficient in form.....	4
D. The question is not moot	4
E. Conclusion	5
II. The Appellant Did Not Receive a Fair Trial, and the Court Erred by Exhibiting Hostility and Bias	5
III. The Court Erred in Excluding Proffered Evidence that the Committee Was Acting Improperly and Beyond the Scope of Its Authority	7
IV. The Court Prevented the Defense From Proving, and the Jury From Finding, Matters of Proper Defense	8
V. The Court Erred in Denying the Motion for Judg- ment of Acquittal, Since There Was Insufficient Evidence to Go to the Jury.....	10
1. There was no proof that the Committee sought any testimony from the appellant upon matters of inquiry committed to it	10
2. As an interned enemy alien, the appellant could not be required to testify before the Committee	11
VI. The Committee is Unconstitutional	11
Conclusion	13

CASES CITED

Barsky v. Holtzoff, D. C. App. Misc. 126 (June 11, 1947)	1, 2
Berger v. United States, 255 U. S. 22.....	2, 4
Cantwell v. Connecticut, 310 U. S. 296.....	13
Chafin v. United States, 5 F. (2d) 592.....	4

	Page
Dilling v. United States, 79 App. D. C. 47, 142 F. (2d) 473	5
Fields v. United States, D. C. App. No. 9486 (Oct. 27, 1947)	9
Griffin v. United States, D. C. App. No. 9542 (Dec. 8, 1947)	6
Herndon v. Lowry, 301 U. S. 242.....	12
Hurd v. Letts, 80 App. D. C. 233, 152 F. (2d) 121....	2, 4, 5
Josephson v. United States, C.C.A. 2d, No. 20790 (Dec. 9, 1947)	7, 11
Kilbourn v. Thompson, 103 U. S. 168.....	12
Minnesota & Ontario Paper Co. v. Molyneaux, 70 F. (2d) 545	5
Morris v. United States, 26 F. (2d) 444.....	4
Rudd v. United States, 173 F. 912	5
Stromberg v. California, 283 U. S. 359.....	12
Thomas v. Collins, 323 U. S. 516.....	13
Thornhill v. Alabama, 310 U. S. 88.....	12
United States v. Ballard, 322 U. S. 78.....	13
West Virginia Board of Education v. Barnette, 319 U. S. 624	13

RULES CITED

Federal Rules of Criminal Procedure, Rule 30.....	6
---	---

ARTICLES CITED

Gellhorn, Report on a Report of the House Committee on Un-American Activities, 60 Harv. L. Rev. 1193	12
--	----

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9582.

GERHART EISLER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

REPLY BRIEF FOR APPELLANT.

I. THE AFFIDAVIT OF PREJUDICE.

A. The affidavit was substantively sufficient.

As pointed out in our principal brief, the affidavit of prejudice made two points: (1) Justice Holtzoff's participation in an investigation of the appellant, and (2) his personal hatred of Communists, particularly those who are aliens. The sufficiency of the first point to require disqualification was determined by this Court in *Barsky v. Holtzoff*, Misc. 126, June 11, 1947, under a virtually identical affi-

davit. The appellee's brief meets this ground for reversal solely on the basis that Justice Holtzoff denied the accuracy of some of the affidavit's allegations.

Thus the appellee asks this Court to overrule the clear holding of the Supreme Court in *Berger v. United States*, 255 U. S. 22 that the allegations made in an affidavit of bias or prejudice must be taken as true. In support of this request, the appellee relies on *Hurd v. Letts*, 80 App. D. C. 233, 152 F. (2d) 121, and *Barsky v. Holtzoff*. But neither case is in conflict with the *Berger* case. In the *Hurd* case, there was no discrepancy between the allegations of the affidavit of prejudice and the remarks of the court below. This Court made no finding that the facts stated in the affidavit were untrue, but held only that the facts taken as true were insufficient to establish bias and prejudice. Nor is it correct to state, as the appellee does, that under the doctrine of the *Barsky* case "the trial judge may be heard to deny the allegations of the affidavit." On the contrary, when the trial judge in fact filed such a denial in support of a petition for rehearing in the *Barsky* case, the petition was forthwith denied by this Court.

As to the second ground for disqualification stated in the affidavit of bias and prejudice, the appellee merely sets up the same straw man previously erected by the trial court. The existence of a personal hatred of Communists is an entirely different matter than "opposition to Communism." Just so a Democrat may "oppose" Republicanism without hating Republicans. One attitude reflects a personal bias and prejudice, which is a ground for disqualification; the other merely indicates political or ideological views. In the *Berger* case, the Supreme Court compelled the disqualification of the trial judge because of allegations that the latter disliked German-Americans; that case, therefore, is authority for reversal on the second point of the affidavit here involved.

B. The affidavit was timely.

The record is clear that counsel for appellant first learned on or about May 20, 1947, that Justice Holtzoff was assigned to the trial of the case (J. A. 255). Appellee's speculative reference to the alleged "usual practice" of giving notification of the trial date is obviously irrelevant, since it has no bearing as to when the identity of the trial judge was disclosed. In view of appellee's conjectures on matters not in the record, we feel justified in going outside the record to state that defense counsel first learned of Justice Holtzoff's assignment on May 20 by telephone advice from William Hitz, the Assistant United States Attorney who prosecuted the case.

The appellee's brief treats the trial court's recital of certain events in chambers (J. A. 4) as establishing the facts. As stated in our principal brief (p. 15), we do not believe that it was appropriate for the court below to have made such a recital without evidence in the record, nor do we consider it helpful to the administration of justice to require this appellate Court to make findings on different versions of facts not in the record. Nevertheless, since the appellee relies so heavily on these recitals (Appellee's brief, p. 13) we find it desirable to give our version of the facts. In the conference in Justice Holtzoff's chambers on May 20, David Rein did *not* request a continuance of the *argument on preliminary motions*. He did request a continuance *of the trial*, on the ground that it seemed inappropriate to set a trial date for Monday, May 26, when arguments on motions to dismiss the indictment were to be heard on Friday, May 23. In his view, the arguments in support of the motion to dismiss had considerable merit, were supported by lengthy briefs, and would need careful consideration by the court. Counsel believed it unlikely that the motions could be adequately considered and decided in so short an interval. In deference to this argument the court granted a continuance of the trial for one day.

Appellee argues that the affidavit was not timely because it was filed three days after the first trial date had passed, and only five "legal" days (actually six) before the date on which the trial actually began. But there is no requirement that an affidavit of bias and prejudice be filed any set number of days before a trial date, and indeed it may even be filed during the course of a trial, where circumstances warrant. *Hurd v. Letts, supra*. The requirement is only that it be filed diligently with reference to the time the facts supporting disqualification are learned by defense counsel and verified by him. *Morris v. United States*, 26 F. (2d) 444. *Cf. Chafin v. United States*, 5 F. (2d) 592. We submit that the circumstances set out in our principal brief, which show that the affidavit was filed eight days after knowledge of the assignment of Justice Holtzoff to the case, during which interval the sudden death of the chief trial counsel's brother prevented his immediate attention to the matter, indicate no absence of diligence on the part of counsel.

C. The affidavit was sufficient in form.

Appellee concedes that the certificate of good faith was made by counsel of record. It suggests, however, that the trial court's addendum to the statute that counsel of record also be a member of the local bar would be a "very practical interpretation." We can only suggest, again, that any such amendment of the statute, whether by "very practical interpretation" or otherwise, is for the legislature, not the courts.

D. The question is not moot.

Counsel for appellee argues that the question is moot because the trial has already been held and (as he alleges) appellee in fact received a fair trial. He cites no authority in support of this view. This omission is understandable, since in *Berger v. United States, supra*, the Supreme Court reversed *after* trial simply for failure of the trial judge to

disqualify himself, without reference to the conduct of the trial. And this Court has likewise held that the proper remedy for the failure of a judge to disqualify himself on the filing of an affidavit of bias and prejudice is by appeal and that a writ of prohibition will be granted only in extraordinary circumstances. *Hurd v. Letts, supra; Dilling v. United States*, 79 App. D. C. 47, 142 F. (2d) 473. Accord: *Minnesota & Ontario Paper Co. v. Molyneaux*, 70 F. (2d) 545.

E. Conclusion.

The appellee has not indicated a single respect in which justice would have been burdened if Justice Holtzoff had disqualified himself and the case had been heard by one of the other twelve District justices. We again urge to this Court that the important policy of the statute, as affirmed in the *Berger* case, should not be negated by a grudging and hostile application.

II. THE APPELLANT DID NOT RECEIVE A FAIR TRIAL, AND THE COURT ERRED BY EXHIBITING HOSTILITY AND BIAS.

The nature and extent of the trial court's hostility and bias must be determined on the entire record. Our treatment of the subject in our principal brief was, as we indicated, an effort to assist such a study of the record. The appellee's brief, we submit, makes no contribution in this regard.

The appellee's derogatory references to the conduct of appellant's counsel are unwarranted, and the trial court itself recognized that discourtesy or other misconduct on the part of counsel is not revealed by the record (J. A. 191). In any event, this is not the real issue, which is simply whether the trial court deprived the appellant of a fair trial.

The appellee's quotation from *Rudd v. United States*, 173 F. 912, 914, is unhappily chosen, since the very next sen-

tence reads: "But his [the court's] comments upon the facts should be judicial and dispassionate, *and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment*" (italics supplied). The court in that case reversed the conviction because of the remarks of the court below, and stated:

So positive and emphatic were the remarks of the Court that it is not too much to say the jury may have believed a finding for the accused would have subjected them to ridicule. True, the Court afterwards withdrew the language and said . . . that it was a question for the jury . . . A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain.

The appellee cites *Griffin v. United States*, No. 9542, decided by this Court December 8, 1947, with reference to that part of our argument which dealt with the trial court's undue intervention in examination and cross-examination. The Griffin case involved a single instance of conduct objected to. This Court asserted that it was the trial judge's duty "to ask questions for the purpose of developing the facts." Such was hardly the kind of questioning indulged in by the trial court in this case, as witness the leading questions which interrupted direct examination of the appellant (quoted on page 27 of our brief) and the characterization implicit in the inquiry: "You mean you would have made yourself the judge?" (Appellant's principal brief, p. 28).

In our principal brief, we urged as error the court's violation of Rule 30 of the Rules of Criminal Procedure by its refusal to permit counsel for appellant to object to its supplemental charge out of the hearing of the jury. Appellee argues that this violation may be excused because the only harm resulted from the fact that counsel for appellant stated the matter to which he objected in the presence of the jury and that no such harm would have resulted if counsel had not indicated the portion of the charge to which

he objected. But counsel had the right to state an objection and would have waived his objection if it was not made in accordance with the rule. Rule 30 requires counsel to state "distinctly the matter to which he objects and the ground of his objection." The trial court was not justified in placing counsel in the dilemma of either waiving his objection or stating it in the presence of the jury.

The appellee's brief purports to meet the various points raised by this section of our principal brief. Although we have managed to isolate some of appellee's arguments for purposes of reply, the balance is such a combination of confusion, irrelevancy and obvious misunderstanding of the record and issues, that we are unable to reply to it. We rest, therefore, on the record, which is accurately summarized in our main brief.

III. THE COURT ERRED IN EXCLUDING PROFFERED EVIDENCE THAT THE COMMITTEE WAS ACTING IMPROPERLY AND BEYOND THE SCOPE OF ITS AUTHORITY.

The appellee does not address himself at all to the issue raised by the appellant on the point; the decision in *Josephson v. United States*, C. C. A. 2d, No. 20790, December 7, 1947, is irrelevant.

The appellant here made an offer of proof that the House Committee on Un-American Activities did not summon the appellant in order to elicit any information upon a matter of inquiry committed to it by Congress, but rather to harass and punish him for his political beliefs and to prevent his departure from the United States and his return to Germany; and that the Committee acted for ulterior motives not within the scope of its or Congress' power. The appellant stood ready to prove this contention by documents and by sworn testimony. The proof offered must, on this appeal, be taken as established, since it was excluded by the trial court. We are not seeking to conjecture what questions the Committee might have asked, which was how the

majority viewed Josephson's position. Instead, we attack something the Committee actually did—its subpoenaing of appellant for unlawful purposes. Josephson had been convicted for refusal to answer questions, not, as appellant here, for a default consisting of a failure of appearance. Josephson had not offered to prove such an unlawful use of the subpoena, and no such issue was before the Court or passed upon by it. To sustain the court below is to hold that a Congressional Committee has the power to summon a witness not in order to elicit any information upon a matter of inquiry committed to it by Congress, but rather to harass and punish him for his political beliefs.

IV. THE COURT PREVENTED THE DEFENSE FROM PROVING, AND THE JURY FROM FINDING, MATTERS OF PROPER DEFENSE.

In our principal brief (pp. 37, 38) we pointed out that the trial court had directed a verdict of guilty by expressly finding in its charge that the appellant had refused to take the oath before the House Committee. The Court thus removed from the jury an opportunity to pass on the defense position that the appellant had not refused to be sworn but had merely attempted to state a legal objection to being sworn, as was his right.

The appellee controverts this argument, but its reasoning is beyond our understanding, and we therefore do not reply to it. We suggest that the portions of the trial court's charge and supplemental charge (J. A. 173-177), quoted at pages 37 and 38 of our principal brief, establish the accuracy of our contention.

At the trial, it was the contention of the appellant that he had been willing to be sworn and testify, but that he had wished first to make a legal objection to the right of the Committee to swear him in and interrogate him in view of its actions in improperly procuring his arrest and having him brought before the Committee in custody. The appellant contended further that if he had been permitted

to make this legal objection and the objection had been overruled, he would have then taken the oath and testified. We set forth in our principal brief (pp. 39-40) the instances in which the court refused to permit the appellant to introduce evidence in support of this contention and its refusal to charge the jury that this contention, if supported by the evidence, would constitute a valid defense.

The appellee's brief is not addressed to this point. The issue here is not, as appellee seems to believe, one of good-faith, under the doctrine of *Fields v. United States*, D. C. App. No. 9586, October 27, 1947. It is simply whether or not witnesses before a Congressional Committee are guilty of contempt if they exercise their elemental right of stating a legal objection. Nowhere in its brief does appellee contend that witnesses before a Congressional committee do not have the right to make a legal objection and have it ruled upon by the presiding authority. The chairman of the Committee himself conceded that such a right existed (J. A. 49). Certainly a denial of such an elemental right, afforded every participant in a court proceeding, would be a denial of due process. The issue before this Court is not whether the record supports that contention but whether the appellant was denied the opportunity to prove it and the jury was denied the opportunity to pass upon it.

The brief for appellee falls into the same fallacy as the court below by reiterating the court's statement that a "witness cannot impose his own conditions on his giving of testimony" (brief p. 22, cf. J. A. 173, 177). We make no such contention here, and we made no such contention below. The error of the Court below in misstating the appellant's position is being repeated here by appellee in its brief.

V. THE COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL, SINCE THERE WAS INSUFFICIENT EVIDENCE TO GO TO THE JURY.

1. There was no proof that the Committee sought any testimony from the appellant upon matters of inquiry committed to it.

In our principal brief (p. 46), we pointed out that the government had failed to offer any evidence on an essential allegation of the indictment: that the appellant was summoned to give testimony "upon matters of inquiry committed" to the House Committee. Accordingly the Court should have entered a judgment of acquittal. In reply, the appellee's brief argues that the question of pertinency is one for the court and not for the jury (p. 24). Obviously, a discussion of whether the question of pertinency is one for the court or for the jury has no bearing on the failure of the Government to introduce any evidence to satisfy either court or jury that the appellant was summoned to testify on a matter committed to the Committee. The point made by appellee is, accordingly, entirely irrelevant.

The appellee also urges that "one who refuses to be sworn to testify cannot claim that he was not summoned to testify on matters of inquiry committed to the Committee." The indictment, however, expressly alleges that the appellant was summoned to testify "upon matters of inquiry committed to" the Committee. This was clearly a necessary allegation, in view of the statutory text, and is recited in addition to the allegation of refusal to be sworn. Hence both allegations had to be proved, and proof of one does not eliminate the need to prove the other. Obviously there is no doctrine of law that a defendant may not challenge failure to prove a necessary allegation of the indictment.

2. As an interned enemy alien, the appellant could not be required to testify before the Committee.

Appellee's brief again made the point that this subject raises a question of law for the court, and not one of fact for the jury (Br. p. 25). We do not dispute this, but we fail to see how it has any bearing on the issue now before this Court, which is whether the appellant could be required to testify before the Committee while interned as an enemy alien.

In our principal brief we cited numerous authorities to the effect that an interned enemy alien has the immunities of a prisoner of war. In addition, our principal brief pointed out that for the purposes of this record it has been established that the Alien Enemy Control Unit of the Justice Department accorded such right to enemy aliens arrested under Presidential warrants (pp. 47-48). As against these authorities and the practice of the Alien Enemy Control Unit, the appellee's brief sets up an alleged opinion of an "Interdepartmental Prisoner of War Committee." This opinion is not in the record, and appellee gives no citation of any authority, no reference to any printed, mimeographed or typed report—in fact, not even a quotation supporting the conclusion alleged to have been reached—merely the bald statement. We can only reply that this reliance on some apparently informal and private memorandum known by and available to only one party of a controversy is an innovation in court procedure.

VI. THE COMMITTEE IS UNCONSTITUTIONAL.

In support of the constitutionality of the Committee, the appellee simply cites *Josephson v. United States, supra*, without discussion. We submit that that decision is erroneous and should not be followed by this Court. The defects in the reasoning of the majority are ably expounded in the eloquent dissent of Judge Clark. We note, also, that the question of violation of the Fourth Amendment, raised in

our principal brief, was not raised or passed upon in the *Josephson* decision.

We wish, moreover, to call attention to one feature of the majority decision which clearly demonstrates its fallaciousness. We have shown in our principal brief (pp. 50-53), that the adjectives "subversive and un-American," employed in the act, have no ascertainable legal meaning, and that accordingly, the authority granted the Committee to investigate "propaganda" is unlimited. The majority decision does not dispute this, nor does it deny the authority of *Kilbourn v. Thompson*, 103 U. S. 168, and other Supreme Court cases, that under the Constitution, investigating powers of Congressional committees cannot be without limit.

But, argue the majority, the Committee can, within the terms of the resolution, ask questions within the limit of the Constitution. This is beside the point. Obviously, if the authority is unlimited, it permits inquiries into proper subjects as well as improper subjects. The vice of the statute, however, is that it permits unlimited inquiry into improper subjects as well. And it may be added that as applied the authority has been exercised, largely and almost exclusively, in fields beyond Congress' authority and for the purpose of infringing freedom of thought and expression.¹ It is not the function of the courts to sustain limitless authority on the ground that it may be validly applied. Legislation so broad or vague that it includes within its scope both constitutional and unconstitutional power has consistently been struck down by the Supreme Court. *Thornhill v. Alabama*, 310 U. S. 88; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242.

The Committee's authority to make an unlimited investigation into expressions and belief is clearly invalid. Governmental inquiry into speech and thought and governmental classification of speech and thought constitute a

¹ For a case history of the Committee in action see Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harv. L. Rev. 1193.

burden on freedom of belief and expression in violation of the First Amendment. Cf. *United States v. Ballard*, 322 U. S. 78; *Cantwell v. Connecticut*, 310 U. S. 296; *West Virginia Board of Education v. Barnette*, 319 U. S. 624; *Thomas v. Collins*, 323 U. S. 516. The unlimited grant of investigative authority exceeds the Congressional power and thus also violates the Ninth and Tenth Amendments, under the decisions cited in our principal brief.

CONCLUSION.

We have not troubled to reply to all of the matters in the appellee's brief. We stand on the points made in our principal brief, and submit that the judgment below should be reversed with directions that the indictment be dismissed.

Respectfully submitted,

DAVID REIN,
ABRAHAM J. ISSERMAN,
CAROL KING,
JOSEPH FORER,
Attorneys for Appellant.

**BRIEF FOR NATIONAL LAWYER'S
GUILD
AMICUS CURIAE**

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9582

GERHART EISLER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

NATIONAL LAWYERS GUILD,
ROBERT W. KENNY,
President.

BENEDICT A. LEERBURGER,
25 West 43rd Street,
New York City, New York.
BELFORD V. LAWSON, JR.,
2001 11th Street, N.W.,
Washington, D. C.,
Counsel.

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9582.

GERHART EISLER, *Appellant*.

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

**BRIEF FOR NATIONAL LAWYER'S GUILD
AMICUS CURIAE**

We respectfully refer this Honorable Court to our briefs filed in the case of *Barsky et al. v. United States*, recently argued, and *Dennis v. United States*, (No. 9597), for our position on the important constitutional questions involved in this appeal pertaining to the House Committee on Un-American Activities and the resolution under which it functioned.

The matter presented herein is limited to the error of the trial court in striking the affidavit of personal bias and prejudice which was filed by the defendant, to the court's failure to disqualify itself and to the personal bias and prejudice manifested by the court in the course of the trial of the defendant.

SUMMARY OF ARGUMENT.

The allegations set forth in the affidavit of prejudice gave rise to a fair inference of bias and prejudice and the said affidavit otherwise fulfilled the requirements of the statute. The Court erred in failing to disqualify itself. Throughout the trial the Court manifested actual bias and prejudice. A bar association has the duty to maintain undiluted our civil liberties by calling to the attention of an appropriate court an impingement on the civil liberties of a defendant charged with a criminal offense.

ARGUMENT.

I.

The court erred in failing to disqualify itself on the ground of personal bias and prejudice.

A. The affidavit of prejudice. (J. A. 222)

In summary, the affidavit of bias and prejudice discloses the following: That the defendant is an anti-fascist and was for many years active in the underground movement in Germany against Hitler and the Nazis; that he was a member of the German communist movement; that he was called to testify before the Un-American Activities Committee because of such activities; that at the hearing of the Committee at which the alleged contempt by the defendant arose, there was placed into the record over the signature of J. Edgar Hoover, Director of the FBI, a report of an investigation of the alleged activities of the defendant over many years, which report manifested strong bias and prejudice against the defendant; that during the period of investigation of the defendant by the FBI and until the trial justice was elevated to the bench, the said justice acted as special assistant to the attorney general assigned to the FBI and that his duties were concerned especially with the investigation by the latter into the activities of aliens and communists, the defendant being in both of these cate-

gories; (the close personal relationship between the trial justice and the director of the Bureau of Investigation and the former's active participation in the affairs of this bureau is significantly disclosed in a letter written by the trial justice and published in the Congressional Record); that the trial justice while a special assistant to the attorney general sponsored and supported a bill permitting the deportation of aliens and their placement *in concentration camps upon proof of membership in the Communist Party* (emphasis supplied); that his defense of the Bureau reached a point of such intensity that he was charged with distortion of facts; that the trial justice espoused the intemperate views of the director on communists and communism, whom he publicly praised, and sponsored both legislative and other activities expressing these views; that the trial justice had testified publicly that he had direct knowledge of the day to day activities of the FBI and that this knowledge covered in large part the period of the investigation of the defendant by the FBI; that the trial justice participated in policy matters regarding the investigation by the FBI of aliens and communists, including the defendant; that the trial justice defended the propriety of a compilation of intelligence of persons not charged with crime nor suspected of violations of law but whose political views did not correspond with those deemed proper by the FBI, including communists; that the issues at the trial of defendant involved the right of the House Committee on Un-American Activities to question defendant on alleged "un-American" matters, political and otherwise, and the constitutionality of the resolution under which the Committee functioned and that the bias and prejudice of the trial justice against the defendant rendered him incapable of giving the defendant a fair trial.

B. The grounds for striking the affidavit.

At the opening of court on the day of trial justice struck the affidavit. He assigned three reasons for so doing. Let us examine them.

(1) "The affidavit is filed too late." (J. A. 4)

Actually only eight days had elapsed from the time defendant's counsel were first advised that Justice Holtzoff would preside at the trial to the filing of the affidavit and the trial date was still a week distant. The essential absence of timeliness is based on the fact that a motion to dismiss the indictment had previously been argued before the same justice and that two applications for continuance had been disposed of by him, one due to a sudden death in the family of trial counsel. Because of these happenings the court states that the motion is "not made in due time," thus implying that the defendant by his prior motions *had waived the right* to make the statutory objection of bias and prejudice.

We grant generally that a defendant may expressly waive a statutory or constitutional right but we contend here that the defendant in the absence of any express waiver or objective facts indicating such an intention, should not be deemed to have waived the fundamental right to be tried before an impartial court. The statute (Appendix A, appellant's brief) does not preclude the filing of an affidavit of personal bias and prejudice after motion to dismiss or adjourn has been argued before the trial court. In the instant case the record shows that the short period which elapsed before the filing of the affidavit was utilized by defendant's counsel to investigate the charge of bias raised by the defendant himself and to ascertain that a sound factual basis existed for the affidavit and for the required certificate of good faith (appellant's brief, 12 and 13). We are in entire accord with the statement in appellant's brief (page 13) that "The fact that motions to dismiss the indictment had been decided * * * is immaterial."

(2) "The affidavit is insufficient on its face." (J. A. 4)

We note that the affidavit in this case is substantially the same as that in *Barsky v. Holtzoff*, (April Term 1947, Misc. 126, decided June 11, 1947) and was held by the trial court

so to be. (Appellant's brief 11, 12), and that this court has already passed upon its sufficiency. Though the error of the trial court is thus indicated, we wish to call attention to a highly significant statement in the opinion rendered below.

“Moreover, the allegations relating to Communism are not germane to this case, since Communism is not an issue—In fact, if opposition to Communism were a ground for disqualifying a judge, I dare say it would be a baffling problem to find a Federal judge who is qualified to sit.” (J. A. 5)

The significance of the foregoing lies in its revelation of the complete misunderstanding on the part of the judge as to the basis on which he was asked to disqualify himself.

Assuming that there was no issue of communism or involving the alien question, the absence of these issues does not remove the disqualification of the trial court on a trial of a communist and alien if in fact the court is biased and prejudiced against communists and aliens and against the defendant in particular because he is a communist and alien. The fact of a man's color, religion, nationality or political views may never be an issue before a judge or jury but if the court has manifested bias in fact against Negroes, Catholics, aliens or communists, such bias does constitute a cause for disqualification when a member of the particular group is brought before that court for trial. In this case, the alleged bias was, if anything, a greater cause for disqualification because it was not possible as the case developed, to keep from the jury the fact that the defendant was an alien and a communist.

The issue before the trial court was not whether the trial justice opposed or did not oppose communism nor was the issue whether the trial court was in fact prejudiced as alleged in the affidavit. The statute wisely does not permit any investigation into the truth of the issues of fact raised by the affidavit of bias and prejudice. The trial court may neither deny or otherwise traverse the allegations con-

tained in the affidavit by counter affidavit, statement or testimony. The issue squarely before the court under the statutory indictment was whether the affidavit alleged such facts that bias and prejudice on the part of the trial court could reasonably be inferred therefrom. *Berger v. United States*, 255 U. S. 22, 33, 34. That issue the trial court ignored in its ruling to strike the affidavit in question. Otherwise the court would have disqualified itself and proceeded no further with the trial of the case.

(3) "The certificate attached to the affidavit is not signed by counsel of record in this case."

The certificate in the instant case was signed by the attorney who appeared for the defendant and who in fact was counsel of record, having been so admitted *pro hac vice* by Chief Justice Laws. Her status as counsel of record was stipulated. (J. A. 229, 230). The court in its opinion striking the affidavit of prejudice held that the certificate had not been signed by counsel of record (J. A. 5, 6). Later, on the motion for a new trial, after the court was advised that defense counsel Carol King, who had signed the certificate of good faith, was in fact "counsel of record" (J. A. 183), the court held that such certificate of good faith must be signed by a counsel of record who is also a member of the District bar—a requirement which finds no warrant in the statute.

Soundly based upon the importance of trial before unbiased tribunals, the punctilio of judicial honor, as well as the statute, require a trial court to withdraw when a bona fide charge of prejudice is made as appears in this case. It is something less than an expression of such punctilio to be dissuaded from so doing on the basis of a refinement of interpretation as trivial and unprecedented as that relied on by the court in challenging the sufficiency of the certificate of good faith filed by counsel.

(4) At the conclusion of the trial, after argument made in support of a motion in arrest of judgment and for a new trial, the court felt called upon to make "some addi-

tional observations—in regard to the contention that the judge should have disqualified himself.” (J. A. 205, 206, 207) These were substantially a restatement of the reasons discussed above.

Although the judge in his opinion on motion for a new trial (J. A. 228) undertakes to incorporate some denials of the averments set forth in the defendant’s affidavit of prejudice, (a practice not envisaged in the statute), it is significant that there is no denial of the fact that the trial justice himself while a special assistant to the attorney general “sponsored and supported a bill permitting the deportation of aliens and their being placed in concentration camps upon proof of membership in the communist party.” (J. A. 223). Nor is there denial that the trial justice “defended the propriety of a compilation by the Federal Bureau of Investigation of intelligence concerning persons who were not criminals and who were neither charged with nor suspected of violations of law, but whose political views and opinions differed from those deemed to be proper by the Federal Bureau of Investigation, clearly including those believed to be communists.” (J. A. 224) Nor is there any denial that the trial justice had “almost daily” contacts with the FBI and that he appeared for the FBI on many occasions and defended it to the point where he was “publicly and responsibly charged with distorting facts”, nor does the trial justice deny that he “sponsored activities legislative and otherwise” which “reflected” the “intemperate views” of J. Edgar Hoover on communists and communism.

Concluding this point, it is submitted that the affidavit of prejudice permits of the fair inference that the trial justice was in fact biased and prejudiced against defendant. Clearly this defendant, himself an alien and communist, had the right to be tried by a trial justice who did not believe that a man’s liberty should be taken from him by placing him in a concentration camp, just because he was an alien communist, and who otherwise displayed

intemperate and violent animus against communists and aliens, including the defendant. As important as this is to the defendant it is of greater importance to the preservation of our judicial system.

“The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality—The urgency of a particular case is not so much to be regarded as the elevation and honor of courts of justice, whose dignity and purity constitutes a main pillar of the state.” (*Oakley v. Aspinwall*, 3 N. Y. 547)

As the Court said in the *Berger* case (255 U. S. at 35, 36), “the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial.”

It is due to the decisive importance of an impartial Court to the true administration of justice that the National Lawyers Guild deemed it essential to intervene in this case. If the Court's own view of its subjective state of impartiality can be a factor in determining whether a trial Court shall disqualify itself upon the filing of an affidavit of prejudice pursuant to the statute, then the salutary effect of the statute is bound to be defeated. For it is precisely the Court which is prejudiced that is most likely to decide that the affidavit is not filed in good faith, or that the inferences logically drawn from its allegations, are unfounded. The best administration of justice requires the most liberal construction of the statute. We do not believe that such a construction of the statute as we support, will lead to abuses, since only one trial Court can be so challenged. The Supreme Court recognized this in the *Berger* case when it said (255 U. S. at 35), “what concern is it to a judge to preside in a particular case? Of what concern to other parties to have him so preside?”

II.

The trial justice manifested actual bias and prejudice at the trial.

We shall not recapitulate all of the trial incidents as set forth in detail in appellant's brief pages 16 to 35, some of which standing alone might appear to be of no serious consequence, but all taken together lead to but one conclusion. The bias itself became part of the trial atmosphere and permeated the entire proceedings from the very opening to and including the declaration of sentence.

The following instance, which we believe is a typical one, can be explained only on the rationale that the trial justice was indeed hostile to the defendant.

During the cross-examination of Congressman Thomas (J. A. 50, 51) government counsel interrupted to ask a question. He said "What sentence are you talking about?" This question was addressed to counsel for the defendant, and not to the witness. No objection had been made to the question then pending. This interruption went unrebuked by the court; but when defendant's counsel replied, the judge stated "Let us not have any colloquy." Counsel for the defendant then said "Well, I would like to get an answer from the witness." It is difficult to understand what possible impropriety there was in this statement. The witness not having answered, because of the interruption of governmental counsel, it was clearly in order for the defendant's attorney to call this situation to the attention of the trial justice. The court, however, acted as if a serious affront had been committed. He called the defendant's counsel to the bench and proceeded to admonish him in the following manner: (J.A. 51, 52)

"Mr. Isserman, the Court appreciates the fact that you are from out of town. I do not know what the practice is in your jurisdiction, but in this court the custom is for counsel to be urbane, courteous and civil and not to speak abruptly or approbriously."

Funk & Wagnall's Practical Standard Dictionary 1930 edition defines the word "urbane": "Characterized by or having refinement, especially in manner, polite; courteous, suave; opposed to *rustic*."

The court's reminder to counsel that he was from out-of-town and that his manner was not "opposed to rustic," indicates that the trial justice was willing for counsel to believe that the court regarded him as one who is unrefined, discourteous and something of a country bumpkin or yokel. Here was a smart even to the least sensitive man too severe, but doubly painful to a lawyer whose sole fault lay in making an innocuous statement, provoked by opposing counsel and made in the climate of a heated trial.

When counsel moved to strike, which was his duty, he was threatened in no uncertain terms: (J.A. 51)

The Court: "I did you the courtesy of saying this at a bench conference, so that the jury should not hear my remarks; but you do not take them in the spirit in which they are intended. If you are not going to be urbane and courteous, I shall the next time I have to call attention to the fact do it in the presence of the jury."

Here indeed was a threat not merely to injure the lawyer alone, but his client's cause as well—an injury to be inflicted in retribution for an act which only the lawyer could commit.

This was a subjective manifestation of a mind so hostile as to give added significance to the fears expressed in the defendant's affidavit of prejudice. That which he feared would take place if compelled to stand his trial before a biased judge was actually coming to pass.

Subsequently, as the appellant's brief demonstrates, the court actually carried out its threat by rebuking counsel in the presence of the jury and in such fashion that it could not fail to prejudice the jury against the defendant. Moreover, the court seemed to have been conscious of the injury it was causing to the defendant by rebuking counsel as the

following colloquy, which took place on the motion for a new trial, indicates: (J.A. 190)

Mr. Isserman: "I should like to go back a minute to the bench conference that your Honor has alluded to. The point I should like to make is that while the Court did say at that bench conference that thereafter a rebuke might be made in the presence of the jury, we say the record shows that rebukes—not the particular rebuke, but other rebukes—were made before and after that particular bench conference and in the presence of the jury. We say that there is no circumstance, as far as we understand the cases, in which a defendant can be punished before the jury by rebuking his counsel in the jury's presence.

The Court: "If counsel oversteps the bounds, I think the Court has a right to check counsel. *It is unfortunate that the defendant suffers.* (Emphasis supplied) But in this particular case the Court took care to explain to counsel at the bench conference the type of conduct and the type of manner that was expected."

These and other examples contained in the record establish clearly that the trial Court was biased and prejudiced to such a degree that the defendant was denied a fair trial.

" * * * though prejudicial argument between court and counsel resulted from the fault of counsel it was nevertheless a ground for reversal." (*Lambert v. U. S.*, 101 Fed. 2d 960. C.C.A. 5th 1939.)

"It is an important rule that an attorney-at-law appearing in open court in the trial of a case is entitled to such treatment from the court that the interest of his client may not be prejudiced. This is not a matter of indulgence but of right." (*Groer v. U. S.*, 289 Fed. 544, 545—App. D. C. 1923.)

"The trial judge should be so impartial in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused." (*Egan v. United States*, 287 Fed. 958, 971. App. D. C. 1923.)

The conduct of the trial court undoubtedly violated the Fifteenth Canon of Judicial Ethics of the American Bar Association which reads in part:

"Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants or witnesses, he should avoid a controversial manner or tone.

"He should avoid interruption of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or premature judgment."

The record not only shows that the allegations in the affidavit of bias and prejudice were well founded and required the trial court's disqualification but in themselves constitute an independent ground for reversal. They are also a concrete illustration of the injury to our system of justice which flows from permitting the trial court to pass upon the truth or good faith of an affidavit of prejudice.

III.

In calling to the attention of this court the impingement of the civil liberties of the defendant this bar association is performing its duty as such.

We shall not belabor the point that a fair trial is the *sine qua non* of American criminal jurisprudence; and that such a trial can not in its very essence take place before a judge who is biased and prejudiced. It is the particular and peculiar concern of a bar association to assist in maintaining in undiluted purity the stream of justice. This concern manifests itself not alone in the maintenance of the integrity of the bar, but of the bench as well. A violation of the civil rights of the most humble is but the initial erosive process that can end only with the complete stultification of both bar and bench and in destruction of the confidence of the people in the judicial process.

Particularly in the present period, with the ever-increasing intensity of anti-communist hysteria officially recognized, (as shown in The Report of the President's Committee on Civil Rights, p. 49) utmost vigilance and care must be exercised that such hysteria is not allowed to permeate into the court room and affect either judge or jury. In the instant case the defendant was a well known and much publicized German communist. His political views and activities were woven into the fabric of the trial. Under the most auspicious circumstances a fair trial on the merits of the indictment free from any taint of bias or prejudice because of his opinions or activities would be difficult. It became impossible before a trial justice who from the outset was charged with being biased and prejudiced and manifested that bias and prejudice not only in failing to disqualify himself but also in his actual conduct of the trial. The defendant thus did not receive a fair trial and was convicted without due process of law. Where such lack of due process stems from the conduct of the trial court and is called to the attention of a bar association it is incumbent upon that association to express its concern in the appellate tribunal.

As was said by Mr. Justice William O. Douglas (address at the Annual Dinner of the Rhode Island Bar Association, October 29, 1947):

"The responsibility for making our civil rights an active, potent force in our national life is in large measure a special responsibility of the Bar."

Respectfully submitted,

NATIONAL LAWYERS GUILD,
ROBERT W. KENNY,
President.

BENEDICT A. LEEBURGER,
25 West 43rd Street,
New York City, New York.

BELFORD V. LAWSON, JR.,
2001 11th Street, N.W.,
Washington, D. C.,
Counsel.